88-1343 (1)

Supreme Court, U.S.
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No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1988

CHARLES F. DARLINGTON

Petitioner

against

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ISSUES PRESENTED

The defendant was convicted of filing a false document (18 USC 1001) on the uncorroborated testimony of a single "accomplice", a person who admitted his intent to defraud the government.

> If the accomplice cannot "pass muster" under the test of Valdez v. United States, 244 US 432 (1917), can his uncorroborated testimony alone be enough to convict?
>
> Should the "two witness" rule, applied in perjury prosecutions be applied to a "false statement" prosecution?
>
> Does a conviction based solely upon such evidence provide a basis for a rational trier of fact to find proof beyond a reasonable doubt as mandated by Jackson v. Virginia, 443 US 307 (1979)?

The trial judge, as trier of the fact, found that the defendant "prove(d) his good character and reputation at the bar and in the community for truth and

veracity" and "showed himself to be a pillar of the community and fine family man".

> Does the failure of the trier of the fact to consider those factors on the issue of guilt or innocence violate Edgington v. United States, 164 US 361 (1896)? Under the circumstances of the instant case does defendant's good character create a reasonable doubt?

The trial judge ordered production of "statements", taken by government agents from witnesses. The agents took "statements", as defined by 18 USC 3500 (e) (2) from witnesses and then at some unknown later time, destroyed those "statements" and wrote reports based upon them, reports which did not accurately reflect the "statements", and which were not "adopted" by the witnesses. The government was not able to comply with the direction of the trial court.

> Does the destruction of those "statements", in violation of the "Jencks Act" and the INS regulations mandate the imposition of sanctions? The issue presented was reserved by this Court in Palermo v. United States, 360 US 343 (1959).
>
> Does such intentional destruction violate the defendant's Sixth Amendment rights? The issue was reserved by this Court in United States v. Augenblick, 393 US 348 (1969).

The trial court ordered production of certain statements pursuant to a specific Brady request, and the documents were not produced by the government. Related documents, for which a general request was made, were also not produced. The documents go directly to the issue of guilt or innocence. Had the defendant been aware of the latter document his defense would probably have been different, and based upon the documents in question, the outcome of the trial would probably have been different.

Did the failure to produce those documents deprive the defendant of a fair trial and due process?

The trial court did not rule on the issue of whether sanctions should be imposed under the "Jencks Act" (18 USC 3500 [d]) for failure to produce the "statements" as ordered. The Court of Appeals found that the trial judge had so ruled, against the defendant. The trial judge, when the issue was again presented to him, found that the Court of Appeals had ruled on the issue so that he could not.

Does the failure of the courts to rule on a substantial issue, the trial court and appellate court each wrongfully finding that the other had, deprive the defendant of a fair trial, due process and the right to appeal?

"While every criminal conviction is important to the defendant, there is a special poignancy and a corresponding responsibility on reviewing judges when,

as here, the defendants have been men of blameless lives and respected members of a learned profession," (United States v. Simon, 425 F2d 796 (2 Cir 1970), cert den 397 US 1006

> Does the failure of the Court of Appeals to consider the appeal on the proper facts deprive defendant of his statutory right to appeal?

PARTIES TO PROCEEDINGS

1. Indictment Number 86 Cr 779 (USDCSDNY) charged Charles F. Darlington III, Arlene Cureton, Denise Oliver, Patricia Parris, Angelo Elusma and Jean Louissaint.

Cureton, Oliver and Parris admitted to arranging marriages, entered into agreements and entered pleas of guilty prior to trial.

Louissaint was severed, when he received defective notice of trial, and was tried separately.

Elusma was tried jointly with defendant and was convicted. He appealed to the Court of Appeals and the judgment was affirmed.

2. Indictment Number 86 Cr 1017 (USDCSDNY) charged Charles F. Darlington III, Clyde Day, Michelle

Griffin and Bonita Macintosh.

Griffin admitted to arranging marriages, entered into an agreement and entered a plea of guilty prior to trial. MacIntosh was a fugitive at the time of trial.

Day was severed and tried separately. The indictment against defendant was consolidated with 86 Cr 779 for trial.

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CASE REPORTED

The decision of the Court of Appeals is reported:

United States v. Elusma, 849 F2d 76 (2 Cir 1988)

JURISDICTION

Judgment was entered December 3, 1987.

Judgment was affirmed on June 10, 1988.

A petition for rehearing with a suggestion for a hearing en banc was denied on September 27, 1988

A motion to the trial court to resettle an order of that court dated October 14, 1987, denying a Rule 33 motion, was denied on October 12, 1988.

A petition for rehearing on a record supplemented by the October 12, 1988, proceedings was denied on November 15, 1988.

The statutory basis for jurisdiction is 28 USC 1254.

AUTHORITIES

FIFTH AMENDMENT

No person shall be...deprived of life, liberty, or property, without due process of law....

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to...be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor...

18 USC 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, ficticious or fraudulent statements or representations, or makes or uses ony false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 USC 1621 Perjury generally

Whoever-...

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does

not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 USC 1622 Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 USC 3500 Demands for production of statements and reports of witnesses

(b) After a witness called by the United States has testified on direct examination, the court shall on motion of the defendant order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified...

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness and the trial shall proceed...

(e) The term "statement" as used in subsections (b), (c), and (d) of

this section in relation to any witness called by the United States, means-...

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

INS Examinations Handbook

In criminal prosectuions, the Jencks Act (18 USC 3500) generally requires that a statement in the possession of the United States which was made by a Government witness be produced after the witness' testimony and upon demand of the defense...

The remedy for violations of Jencks is suppression of the witness' testimony. The following steps should be taken to avoid jeopardizing cases:

1. All original notes of witness and/or defendant interviews must be retained;

2. All original notes made during surveillance operations that the investigator may later be required to testify about must be retained; and

3. All original drafts of reports concerning interviews and surveillance operations that the investigator may later be required to testify about if they are the investigator's first written record of the interview or surveillance.

INITIAL JURISDICTION

The indictment charged violation of 18 USC 1001 and 18 USC 371.

FACTS

As found by the trier of fact, the defendant, a practicing attorney for over twenty years, "prove(d) his good character and reputation at the bar and in the community for truth and veracity" (A163). He "had no motive to become part of a conspiracy to effectuate sham marriages for Haitian aliens as charged" (A171), and "he didn't do it for money" (A355). "The (trial) court agrees that (he) acted out of character in what (he) did here" (A 355). The defendant has always maintained that he never knowingly filed any false documents and that he is innocent of any wrongdoing.

The defendant was convicted of three counts[1] of violating 18 USC 1001

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1. After a hung jury, the trial judge heard the case on the original record.

The defendant was acquitted on two charges of conspiracy and twenty-three other substantive counts.

in that he submitted I-130 forms to INS stating that each of three citizen/alien couples lived together when they did not. The sole evidence on the issues of whether the parties lived together and whether the defendant knew they did not, if they did not, was the testimony of the individual citizen spouse[2]. Each received a "no prosecution" agreement for his cooperation and each showed himself to be a person of poor character with a motive to lie.

The three individuals, Andrew Parris, Albert Scott a/k/a Albert Thomas and Lisa Beechum each testified that he entered into a marriage[3] with a Haitian alien solely for money, though

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2 The alien spouses were not even interviewed by the government (hearing 1/12/87, p.23)).

3. Parris was married in October, 1985, Scott (Thomas) in July, 1984 and Beechum in December, 1985.

none recalled the details of payment, so that the alien could get a green card and that he did not intend to and did not ever live with his spouse. Each was to be paid half the money at the time of marriage and the other half after the alien got his green card.

Parris testified to prior convictions for burglary, robbery and petit larceny. Beechum is a welfare recipient who changed her story each time she told it. Scott (Thomas) has, according to him, about seven convictions. Upon con- viction of a felony, each of the men, based upon his prior record, could an- ticipate a sentence of incarceration. They had no choice but to cooperate. Beechum's predicatment was quite differ- ent, admit a valid marriage and lose her welfare grant, at least in part, and be prosecuted for welfare fraud, or, be prosecuted for immigration fraud and

face a possible term of imprisonment or cooperate and not lose the welfare grant or face prosecution.

Admitted marriage arrangers, who entered into plea and no jail agreements in return for their cooperation, testified that they arranged the marriages and told the citizens that, while they did not have to live with their alien spouses, they should tell defendant that they were living together. They did not testify as to whether Parris, Scott (Thomas) or Beechum ever lived with his spouse or to what happened in defendant's office. They did testify that the citizens were to be paid half their fee at the time of marriage and the other half after the alien received his green card.

Though they would only get the second half of their money after their spouses got their green cards, Scott

(Thomas) and Beechum testified that they and their spouses each told defendant that they were living at different addresses and Parris that he never told defendant he was living with his spouse. Each attributed statements to defendant which would indicate that he knew that the spouses were not living together.

Defendant and his paralegal,[4] who was present at the Parris and Beechum interviews, testified at trial and denied that he had any information which would indicate that the marriages were other than valid. Defendant has always maintained his total innocence.

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4 Janise Parris and her exhusband had been living apart for 16 months but had only been divorced for one. Thus, when Janise came into the office three days after her husband with a new spouse, the defendant's paralegal questioned her to make sure that she loved her new husband and that they were living together and received affirmative responses (SA 43-44).

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION

There was insufficient evidence from which a rational trier of fact could find proof beyond a reasonable doubt (Jackson v. Virginia, 443 US 307 [1979]). A conviction based upon less than proof beyond a reasonable doubt violates the due process clause of the Fifth Amendment (Re Winship, 397 US 358 [1970]).

(A) ACCOMPLICES

On each count, each of which must be considered as a separate indictment (Dunn v. United States, 284 US 390 [1932]), there was one witness, an "accomplice", against defendant and no evidence to corroborate or otherwise substantiate his testimony.

Each of those witnesses, (Scott [Thomas], Parris and Beechum) testified

that he entered into a marriage with an alien solely for money so that the alien could get a "green card" and that he had no intention of and never did live with his spouse. Each of the witnesses, by virtue of his own admission of an attempt to defraud the government is an "accomplice" (co-conspirator).

The testimony of an accomplice "is not to be summarily discarded but to be judged of by confirming or opposing circumstances as well as by his character and the influences that may invest him" (Valdez v. United States, 244 US 432 [1917]).

There are no circumstances confirming the story told by the citizen spouses and the circumstances oppose those stories.

Each witnesss married solely for money but could not recall the details of payment (Parris was paid $250

after the ceremony and $250 after the attorney (A41) or, as he told the agents, $300 after the wedding and $200 after the lawyer (A433); Thomas was paid $500 after the lawyer (A110) and, as he told the agents, $500 by the arranger when he asked for it and an additional $200 by his wife (A459), or, as he testified at the subsequent Louissaint trial, $500 after the lawyer and $50 from the arranger and the remainder from his wife (United States v. Louissaint 153-54); Beechum's husband went to the bank before (A67) or after (A145) the lawyer and she was paid after the lawyer (A75-76) or, as she told the agents, before the lawyer [A367]). Yet, each claimed to remember precisely what was said in defendant's office, but only insofar as it would involve defendant in wrongful conduct.

The defendant, and his para-

legal on the two occasions that she was present, denied that anything occurred during the interviews which would lead one to believe that the marriages were questionable.

The "arrangers" testified that they told each of the citizens to tell defendant that he and his spouse were living together[5]. The citizen spouses each denied having been given such instruction (A47, A82-83, A114). Each citizen claimed at trial that he did not tell the lawyer that he was living with his spouse, even though he would not get the second half of his money until after his spouse got a green card. (Beechum testified in the grand jury, the only one to so testify, that she had been instructed not to let the defendant

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5. The trial judge found that relevant only on the conspiracy count (A 225).

"mislead" her and to make sure she and her husband wrote the same address [Ex. L, A145], instructions she denied on trial [A 82-83]). If one married solely for money, he would remember the details of payment and would not jeopardize any part of his payment by not following instructions.

Each witness professed to have an excellent recollection of what happened in defendant's office, insofar as it would involve him in wrongful conduct, yet each had a flawed recollection of basic details. Scott (Thomas) thinks that he mentioned to defendant that his name was Thomas but doesn't recall telling him either name (A112). Parris swore when he got his license that he lived at 311 So. 8th Ave., Mt Vernon (A121) and at trial that he lived, at the time of his marriage, at 60 Horton Ave., New Rochelle (A40). He

did not remember giving anybody his birth cerrificate (A58) but the original, issued May 1, 1967, was in the file.

Parris and Beechum and Scott (Thomas) each testified that he went with his spouse both to get the marriage license and to the defendant's office (A34,37; A65,69). The marriage license applications, which the defendant did not have until shortly before trial, showed that the spouses did not give consistent information. Parris' wife stated, when she got her license, that she was born January 25, 1958, was unemployed and had not been married before (A121), but at the intake, done four days later by defendant's paralegal, stated that she was born November 7, 1957, had been employed at the Coachman Hotel for two years and had previously been married to Delima Philus

(Ex. EE, 943). On December 2, 1985, Beechum's husband stated that he was born December 10, 1958 and worked at Beef Steak Charles (A116) but on December 3, 1985, stated to defendant's paralegal that he was born October 12, 1958 and had worked at Sears since April, 1985 (Ex. HH, ex 33, A118, A156, 985). Scott (Thomas) wife gave her wrong age on the license application (A125). The information was so basic that Parris, Beechum, and Scott (Thomas) either lied when they stated that they went both places with their spouse, or had no recollection of the events.

Beechum had no idea what happened. Beechum told the AUSA in July 1986, before the grand jury, that she makes a different capital "A" (her married name was Alincar) and didn't remember signing the I-130 (A81) or that she refused to sign it (A368), but at trial

it was her signature (A72). About the differences, she explained that "it was white" and she signed it (A75, A151), that she "did not sign no white sheet of paper" (A81). She further explained that she denied it was her signature because she "didn't remember signing a yellow sheet of paper" (A74-75) and "when he showed me that copy I told him that I did not sign no white sheet of paper. I signed a yellow one and a blue one" (A81).

Beechum was thoroughly confused about other aspects of the interview. She testified that her husband paid defendant $700. and did not get a receipt (A151) but exhibit 101 is a receipt given to her husband that day for a $200. payment. On December 2, 1985, she stated that she was born at Valhalla, New York (A116) but on December 3, 1985, she told defendant's paralegal

that she was born at New York, New York (A156). Based solely upon Beechum's incredible testimony about what happened in defendant's office, the trier of fact concluded, "While the usual difficulties which inure in the credibility of all of the prosecution witnesses are present with Ms. Beechum, this Court observed her and believes that she was essentially a credible and truthful witness, whose memory of the event is accurate" (A224-25), and found the defendant guilty.

The character of the witnesses is best shown by their utter contempt for the system. All three expressed their willingness to defraud the government in exchange for the payment of money. Scott (Thomas) and Parris have multiple convictions for crimes involving moral turpitude. Beechum repeatedly told different and contradictory

stories, at will, all the time swearing that she had a clear recollection of the events about which she testified. After her testimony, she gave an even clearer picture of her true character. As she left the witness stand, Beechum passed by defense counsel and uttered an obscenity at him (A95), or, as she told an agent, at the system (A95-96). She then approached a juror and "said it was funny or something and I (the juror) kept walking on " (525). Beechum described the encounter, "Beechum said to her, 'well what do you think'. And juror number two said to her, something along the lines of I think it is hilarious or something along those lines" (A94-95). At about the time those events were occuring, $64 was stolen from the juror's purse, a theft for which two other witnesses were later arrested.

B) DEFENDANT'S GOOD CHARACTER

As found by the trier of fact, the defendant "prove(d) his good character and reputation at the bar and in the community for truth and veracity" and "showed himself to be a pillar of the community and fine family man" (A163). An examination of the decision shows that that factor was not considered on the issue and guilt or innocence was determined solely upon an analysis of the testimony of the citizen witness. The defendant's good character, had it been properly considered, would have been sufficient, under the circumstances, to create a reasonable doubt (Edgington v. United States, 164 US 361 [1896]).

Good character, proven by a reputation for truth and veracity is relevent and must be considered when the crime charged is crimen falsi (Darland

v. United States, 626 F2d 1235 [5Cir 1980]). Proper consideration of such evidence is particularly important where the government's case is based entirely upon "testimony of self-confessed accomplices" (United States v. Quick, 128 F2d 832 [3 Cir 1942]), or even chiefly "upon the evidence of admitted accomplices" (Nanfito v. United States, 20 F2d 376 [8Cir 1927]).

> "The jurors are entitled to infer that a person with a solid professional reputation, and therefore with much to lose, is less likely to risk his career in a criminal escapade than is a person with no future in the legitimate world" (United States v. Burke, 781 F2d 1234 (7 Cir 1985).

C) MOTIVE

Each of the citizens had a motive to cooperate and testify against defendant. The men, based upon their prior criminal records, could expect incarceration upon a conviction of

fraud. If Beechum admitted a valid marriage, she would lose her welfare grant and face prosecution and if she did not cooperate, face prosecution based upon a fraudulent marriage. The only viable choice for each was to testify against the defendant in exchange for an agreement of no prosecution.

As found by the trier of fact, the defendant "had no motive to become part of a conspiracy to effectuate sham marriages for Haitian[6] aliens as charged" (A 171), "he didn't do it for money" (A355), and "his practice was far larger than his talent and support facilities could accommodate" (A171).

If the testimony of the accomplice (co-conspirator) is not to be summarily discarded based upon the Valdez

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6. All Haitian cases, not just marriages, accounted for about 5% of the case load of the office (SA58).

analysis, corroboration should be required before consideration is given to it (Holmgren v. United States, 217 US 509 [1909]). There is no corroboration.

In Caminetti v. United States, 242 US 470, (1917), this Court reiterated the rule of Holmgren that it is "the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and torequire corroborating testimony before giving credence to such evidence", and then announced

> "While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." (at 495)

That statement, in a case where "there was substantial testimony tending to support the verdicts rendered", has been cited by many courts as standing for the proposition that a conviction can be had

on the uncorroborated testimony of accomplices (see e.g., Krulewitch v. United States, 336 US 440 [1948], Jackson, concurring).

> "It is important to note that the key word 'uncorroborated' was omitted from the last sentence in the above (Caminetti) quote" (United States v. Hibler, 463 F2d 455 [9 Cir 1972], Anderson concurring specially).

The injustice caused by basing a conviction solely upon the uncorroborated testimony of an accomplice is well illustrated by the Scott (Thomas) count.

The trier of fact found Scott (Thomas) "to be truthful and sufficiently detailed in his testimony. His demeanor was candid and his credibility was unshaken on cross-examination" (A191). Perhaps unshaken on cross-examination, but on another trial approximaterly two months later, he testified differently, and inconsistently.

His residency at the time in question is a good example.

At trial, he testified,

> "Q. Before you were imprisoned on your most recent conviction where were you living?
>
> A. In Mount Vernon, 70 Horton Avenue.
>
> Q. Where was that?
>
> A. New Rochelle.
>
> Q. How long were you living at that address?
>
> A. About five months, six months something like that" (A99).

His "rap" sheet shows that at the time of that arrest, on October 18, 1984, three months after his marriage, he gave his address as 145 South First Avenue, Mount Vernon, New York, an address he swore to before the Court Clerk at the time of conviction on that charge. At the Louissaint trial, he testified,

> "Q. Do you recall when that was (that you last saw your wife)?

> Q. What was the occasion of your meeting with her, on the day before your arrest?
>
> A. I was going to school up the hill from my house.
>
> Q. You just accidently bumped into her?
>
> A. I have to pass her house anyway".(Louissaint, 163)

His wife lived, according to Scott (Thomas), at 137 Fisher Avenue, White Plains, about 7 1/2 miles from New Rochelle.[7]

Scott (Thomas) swore on three different occasions that at the same time he lived at three different places, Mount Vernon, New Rochelle and White Plains.

As to whether he was told that he didn't have to live with his wife, Scott (Thomas) testified,

> "Q. Did he (Jean) tell you whether or not you have to live

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7. White Plains is north of New Rochelle. There is a school up a hill about two blocks south of 137 Fisher Ave.

with Miss D'Haiti after you got married?

A. No, he did not.

Q. What did he say about that?

A. It never really came up." (A101)

At the Louissaint trial, he testified,

"Q. Did you discuss with Mr. Louissaint whether or not you had to live with Miss D'Haiti

A. I was told that I didn't have to live with her.

Q. Who told you that?

A. Jean."(Louissaint 144)

Scott (Thomas) also had different stories to tell about who was with him at different stages of the marriage process, and trip to defendants office.

Scott (Thomas) may have held up on cross-examination but nobody was aware of the fact that he would testify, just as surely, to different facts when asked the same questions two months later.

It is undoubtedly because of the knowledge that "when there is no corroboration, the problem of perjury looms large (with) the danger that an innocent person might be convicted solely on the perjurious fabrication of an alleged accomplice" (United States v. Lee, 506 F2d 111 [DC Cir 1976] cert den 421 US 1002) that the courts have fashioned rules of corroboration for certain situations.

D) TWO WITNESS RULE

Falsity is the "corpus delicti" of 18 USC 1001 as it is of perjury and subornation of perjury so the "general rule", "that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury" (Hammer v. United States, 271 US 620 (1926)), should apply (United

States v. Gold, 237 F2d 764 (DC Cir en banc 1956) rev oth gr 352 US 985; contra United States v. Marchioso, 344 F2d 653 [2 Cir 1965]).

> "False representations (under 18 USC 1001), like common law perjury require proof of actual falsity"
> (United States v. Diogo, 320 F2d 898 [2 Cir 1963])

The perjury and subornation of perjury statutes require proof of falsity and the additional element that the statement was under oath. The false statement statute requires proof of falsity and the additional element that the matter be within the jurisdiction of a department or agency of the government.

The documents in question were submitted to an agency of the government and contained a sworn statement by the petitioner (18 USC 1621 [2]) and a declaration by defendant that it "is based on all information of which I have any

knowledge". The document itself proved the additional elements under both false statement and perjury sections. The defendant could have been charged with subornation of perjury (18 USC 1622).

The common issue presented, under either a perjury or false statement charge, is the element of falsity. The only evidence on that issue is the uncorroborated testimony of a single witness. On a perjury prosecution, the "two witness" rule is invoked to prevent conviction; so must it be on a false statement prosecution.

E) REPUGNANT VERDICT

To hold otherwise creates an anomalous situation where the defendant could not be convicted of the lesser offense of perjury (maximum penalty 5 years and $2000.00 fine) because there was insufficient evidence of falsity,

but was convicted of the greater crime of submitting a false instrument (maximum penalty 5 years and $10,000 fine), which requires proof of the very same falsity.

There were two facts that had to be proven to prove the charges: a) the spouses did not live together and had no intention of doing so, and b) the defendant knew or should have known[8] that they did not. The only evidence on either issue was the uncorroborated testimony of a single accomplice (co-conspirator) of bad character who admitted his intent to defraud, all the time swearing that the incredible story that he told was true. The defendant, who "had no motive to become part of a conspiracy to effectuate sham marriages for Haitian aliens as charged" (A 171) and

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8. The theory of "conscious avoidance" was applied to the Parris count.

who "prove(d) his good character and reputation at the bar and in the community for truth and veracity" (A163), and his paralegal both swore that the story told of wrongdoing in defendant's office was untrue.

There was no evidence upon which a "rational trier of fact could find guilt beyond a reasonable doubt". (Jackson v. Virginia, supra).

JENCKS AND BRADY VIOLATIONS REQUIRE REVERSAL

When they interviewed witnesses, the INS agents took notes which amounted to "statements" under 18 USC 3500(e)(2). At some later time the agents wrote "reports" and discarded the contemporaneously made "statements", an action which violated existing INS rules requiring that all notes and statements be retained,

> "All original notes of witness and/or defendant interviews must be retained" (SA 2)

and the "Jencks Act".

Upon request, the trial judge directed that all notes[9] of witness interviews be produced (the agents did not testify) but only one "statement"

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9. The ruling by the trial court included not only "statements" but also "scratch notes" (710-11).

(which pertains to an acquittal count) was extant. As later stated by the trial judge, "the trial court ordered all that it could order" (SSA 12) "but the court can't require the performance of an impossible act, and if these papers don't exist, they can't be used" (SSA 10). The ruling by the trial judge which is tantamount to a holding that the agents deliberate and wrongful destruction of "statements" abridges the right of cross-examination, violates defendant's Sixth Amendment rights to compulsory process and to confront the witnesses against him (The issue of a Sixth Amendment violation was reserved by the Court in United States v. Augenblick, 393 US 348 [1969]). Sanctions mandated by the "Jencks Act" should have been imposed (18 USC 3500 [d]).

When the trial judge ordered

production, the government did not argue that they were not "Jencks Act" "statements" or otherwise not producible. The only response was that they had been routinely destroyed and could not be produced.

The Court of Appeals stated

> "We see no reason to disagree with Judge Brieant's finding of 'no violation of the Brady rule or Section 3500' Cf. United States v. Petrillo, 821 F 2d 85,88 (2Cir 1987)(trial court's rulings on withholding of allegedly exculpatory evidence given great deference)"

The trial court did not so hold. On the defendant's post conviction motion, he argued that statements from the alien spouses and handwriting analysis was newly discovered evidence. In denying the motion, the trial judge stated

> "When I say that, I'm speaking of marriage license applications, birth certificates,

> I-130 forms and similar matters. The defendant knew well in advance of trial and had copies of these documents, and the Court finds no violation of the Brady rule or Section 3500, of Title 18 in the course of this trial or at any pre-trial stage and the defendants cannot be heard to claim at this late date that their discovery of handwriting discrepancies if such there be, could not have been made earlier with the exercise of due diligence." (A57-58)

The defendant then made another motion to the trial court seeking a holding that it did not hold as stated by the Court of Appeals. The trial judge stated,

> "The Court: I think the Circuit Court understands the issue here. I think that this Court ordered it produced. It turned out it couldn't be produced. I don't know what else there is to do with this.
>
> Ms. Cunard: Your Honor, if it can't be produced it has been wrongfully destroyed in violation of both the agents own rules and case law and sanctions must be imposed.

> The Court: That's what you say, but the difficulty with that is it's, that's not what page 7 of the slip opinion says" (SSA 14).

The only ruling by the trial court was a direction to the government to produce, a direction with which it could not comply because the statements had been routinely destroyed.

The issue reserved by this Court in Campbell v. United States, supra, is squarely presented herein

> Whether "their destruction gives rise to sanctions under sub-section (d), or permits secondary evidence of their contents to be produced"

The reports made by the agents from the interview "statements" will not suffice as an alternative as they contained information supplied by the agents, not the witness, and were given to the witness to study for trial. Arlene Cureton, an arranger, testified that she had a copy of her grand jury

testimony and the agents' reports (170)[10] and used them to refresh her recollection,

> "I don't have a clear recollection of everything that took place, but I have papers to read what I want to find out"(169-70).

The witness was testifying from the agents' report[11], not her own recollection and was being cross-examined from that report, which contained the agents' imput of facts, not from her recollection of the facts as set forth in the statement that she initially made.

The one "statement" extant, (Levitha de Sousa [A475-78], an acquittal), shows that a lot of recollection

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10 Erroneously referred to as statements, as all "statements" relating to her had been destroyed.

11. There is no indication that she "adopted or approved" (18 USC 3500 [e] [1]) the reports, only that she used them to learn.

refreshing was necessary. Ms. de Sousa first told the agents that she was married in the summer of 1985, when in fact she was married on the coldest day of January, 1986. As shown by the "statement", but not the report, she was shown and identified the marriage license with the correct dates before she mentioned any wintertime occurences.

It is impossible for the defendant to know what was contained in the original "statements", more specifically, those relating to Scott(Thomas), Parris and Beechum. That the reports do not accurately reflect what the witness said may be seen by an examination of the report relating to Theresia Rufus (an acquittal). The report dated July 28, 1986, states, "She and Thelusma went in with Darlington" (A438). Darlington is a name supplied by the agents and not

the witness. Rufus testified in the grand jury (SA 25-26), at trial (379) and at a subsequent trial (Louissaint, 172) that she did not remember the attorney's name and when the name Darlington was suggested to her in the grand jury, said she wasn't sure (SA 25-26). At trial she stated she did not see the attorney in the courtroom and doesn't remember what he looks like (379). (The fact that De Sousa was asked to identify a codefendant is set forth in the "statement" [A 475] but not the report [A 473]. There is no indication in any report that anyone was asked to identify a picture of defendant.) The agents' report has that degree of distortion about which the courts have expressed concern,

> "And certainly we cannot consider it beyond the bounds of possibility that a report be distorted because of overzealousness on the part of the

> agents preparing it" (United States v. Harrison, 524 F2d 421 [DC Cir 1975]).

Given a copy of the report which had information supplied by the agents and which was previously unknown to the witness, any witness could easily learn the information and testify to something that he did not know.

The real issue in the case was what happened in defendant's office and whether, based upon that, he knew or should have known, if it be the case, that the marriages were fraudulent. The government's whole case rested on the supposed recollection of one witness and the defendant's only means of impeachment was to show a lack of recollection. A defendant's attorney cannot effectively cross-examine a witness about his recollection of events when the facts relating to the events have been provided by someone else, in this

case the INS agents, and given to the witness to learn. If the defendant's attorney only has access to that instructional tool, i.e. the report, not the witness' original statement containing his true recollection of events, the attorney is in effect cross-examining the nonwitness agent who has no knowledge of the facts, and not the witness. The defendant was denied the right of confrontation guaranteed by the Sixth Amendment.

A showing of inconsistency is not a prerequisite to the right of a defendant to discovery of "Jencks Act" statements (Campbell v. United States, 373 US 487 [1963]). The trial court ordered production and the government did not object but simply answered that the materials sought had been routinely destroyed (SA 294, SSA 11). The government's position was later stated, "and your Honor, I represent as an officer of

the court that every single piece of 3500 material, whether it be my interview notes or whatever the agents maintained, has been turned over and all testimony or other prior statements of any of the witnesses has been turned over" (A294). The key word is maintained. All notes and statements were not turned over, only those which were not destroyed by the government (see: United States v. Miranda, 526 F2d 1319 [2 Cir 1975], cert den 429 US 821). The defendant's rights under the "Jencks Act" cannot be sum- marily denied.

Inability to produce "Jencks Act" statements because they have been intentionally destroyed is tantamount to a refusal to produce (United States v. Carrasco, 537 F2d 372 [9Cir 1976]),

> "We have made clear that (the Jencks Act) also imposes a duty on the government to preserve such statements ... Obviously such a duty is necessary to

> prevent wholesale avoidance of the government's obligations by routine destruction of statements made to government agents". (United States v. Sanchez, 635 F2d 47 (2 Cir 1980)

and the trial "court shall strike from the record testimony of the witness" (18 USC 3500 [d]). As the only evidence against the defendant was the testimony of a single witness, the failure of the government to comply with the "Jencks Act" required dismissal of the charges.

The trial judge ordered production of the "statements" and the government did not argue that the documents were not producible under the "Jencks Act" so there is no issue as to their status as "statements". The ruling by the trial judge was undoubtedly correct as the "statements" sought are complete in that they cover every issue about which the agents wanted to know. They were taken down long hand so are unques-

tionably not verbatim, but due to their all inclusive content are "substantially verbatim", if the inclusion of that term in the statute is to have any meaning. "The statute was meant to encompass more than mere automatic reproductions of oral statements" but the exact content of a discoverable statement has not been defined, the determination being left to the sound discretion of the trial judge (Palermo v. United States, 360 US 343 [1959]). Here, the trial judge ordered production and upon the government's failure to produce should have imposed sanctions.

The only evidence against defendant is the testimony of the recollection of a single witness as to what happened in defendant's office. If in fact the witnesses had no recollection of any facts surrounding his marriage until those facts were supplied by an

examination of documents and agent reports there would be a reasonable doubt as to their purported precise recall of events in defendant's office, events which were denied by defendant and his paralegal. Without a recitation by the witness of those events, there is no evidence that defendant had any knowledge of the fraudulent nature of the marriages, if in fact they were fraudulent.

The INS rules requiring agents to retain their original notes were formulated to implement the requirements of the "Jencks Act". The agents acted in bad faith when they deliberately destroyed the "statements" in violation of those rules. The courts must enforce those rules (United States v. Caceres 440 US 741 [1979]), and sanctions must be imposed for their deliberate violation.

Here the Court of Appeals held that agents need not preserve handwritten notes if they incorporate them into formal reports. There was no consideration by the Court of Appeals (or trial court) of whether the notes were "statements" under 18 USC 3500(e)(2), only an assumption by the Court of Appeals that they were the basis of a "statement" under 18 USC 3500(e)(1). As the agents did not testify, and there is no indication that the witnesses who did testify "adopted or approved" the reports, only that they used them to study for trial, the reports were not "statements" of the witness. There is no indication that the "reports" accurately reflect what was in the "statements", and the examples (cited above) of De Sousa and Rufus clearly indicate that they do not.

The routine destruction of the

"statements" of witnesses by the government and its concomitant failure to produce them when ordered to do so by the trial judge violates the defendant's rights under the Fifth (Arizona v. Youngblood, __US__, 57 LW 4013 [1988]) and Sixth Amendments and the "Jencks Act". The sanction of striking the witness' testimony should have been imposed in each instance. The failure to do so requires reversal.

The trial judge ordered the government to produce and turn over as Brady (Brady v. Maryland, 373 US 83 [1963]) material, all statements of Patricia Parris, an arranger, which mentioned Denise Oliver, another arranger, and the prosecutor ~~responded~~, "I will copy the Grand Jury minutes for Ms. Parris, if there are any, and whatever investigative reports we have on her interview" (8). Two statements and a

photographic identification of a Haitian were produced (A428, 464, 471). In the first interview, Ms. Parris was asked, "Did you see Dee Dee (Oliver) since we talked to you?" (A469). There is an earlier statement which was not turned over[12].

The statements of Patricia Parris are particularly important to the defendant as she, together with Oliver, was alleged to have arranged the Parris and Beechum marriages. About the lawyer, unnamed, she told the government:

> "I never spoke to this lawyer. I've seen him he's a tall guy. I only saw him once. I was

---

12. In response to defendant's argument that there is such a statement, the government simply argues that it "agreed to give the defense all of the reports it had relating to interviews of Parris" (brief on appeal, p. 27), not that it did so.

What the government agreed to produce is immaterial, the trial court ordered production of certain statements and the government did not produce them.

> with Dee Dee (Oliver) and Theresia (Rufus)" (A469).

The defendant is a "sixfooter", not overly tall. He does possess one feature that stands out and is normally used to describe him, red hair (see: Hayes p.671). Only three other purported descriptions of defendant were set forth in agents reports, none a conviction count, "grey/blond" (White, A461), "5'10", white" (Butler, A382), and "tall, medium build, with salty brown hair" (Oliver, A421), none accurately describing the defendant's hair.

The description, or lack thereof is more significant when considered with the fact that Ms. Parris' cousin, Theresia Rufus, could not remember what the attorney looked like and could not identify him in the courtroom (379).

The defendant asked for, in a general request, all Brady materials.

None was produced. Sometime after trial while examining the originals of documents, the defendant discovered a statement by Ms. Parris' other cousin, Janice Rufus, which stated that Ms. Parris arranged her marriage but that she was not the person who went to the attorney's office and somebody else must have used her name (A472)[13]. That statement, when considered with the other evidence, clearly indicates the "scam" perpetrated against defendant and the government. Had defendant been aware of the contents of that statement, the defense and the

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13. Janice Rufus was mentioned in the search warrant but her marriage was not an indictment count, indicating that the government was well aware of the fact that in at least some of the cases the persons for whom Patricia Parris allegedly arranged marriages and for whom the defendant filed documents, were not the same person at the time of marriage and at the time of interview in the defendant's office.

outcome of the trial would probably have been different.

In his post-conviction motion, defendant set forth the analysis of Paul Osborn, an examiner of questioned documents, that in 10 of the 26 substantive counts, the person who signed the documents in defendant's office was not theperson who signed the marriage license or certain documents for the government (A 265). Due to a lack of sufficient exemplars, the expert could make no determination in a number of cases, including the conviction counts.

There is a substantial question as to whether the witnesses ever saw defendant and whether they were ever in his office. While the trial judge felt defendant knew who was in his office (A 273), defendant had interviewed about 2,000 people over the three year period in question (SA 61) and could not remem-

ber everyone. The practice of the office was for the defendant to interview both spouses for a short time, related as about 20 minutes (SA 59) on the first visit and then for the alien to return to the office a number of times, most often seeing the paralegal (SA 59), but only in a small number of cases for the citizen to return (SA 60). The short encounter with the citizen meant that in most instances the citizen could only be identified through his spouse who was known, not because he was known. The defendant did not know the witnesses against him, only their names as persons married to an alien client (see: Arizona v. Youngblood, supra, Blackmun dissenting, ftnte 8).

Ms. Parris and three of the persons (the only ones, according to the agents' reports, who were asked) for whom she allegedly arranged marriages

failed to accurately describe defendant. As the Beechum and Parris marriages were also arranged by her, it is reasonable to assume that they would also be unable to describe defendant. If the persons who testified against defendant were not in his office or did not see him, as indicated by the Janice Rufus statement, there could be no conviction. Any information contained in statements by Ms. Parris and Ms. Rufus which would so indicate would be exculpatory under Brady and there is a "reasonable probability that, had the evidence been produced to the defense, the result of the proceeding would have been different" (United States v. Bagley, 373 US 667 [1985]). The failure to produce the Patricia Parris and Janice Rufus statements deprived defendant of a fair trial, and deprived him of due process.

Violations by the government of

Brady and the "Jencks Act" require reversal and dismissal of the indictment.

CUMMULATIVE ERROR REQUIRES REVERSAL

If the uncorroborated testimony of a single witness is sufficient to sustain a conviction, it is of the weakest possible nature. Under those circumstances, cummulative error requires reversal. (United States v. Wallace, 848 F2d 1464 [9 Cir 1988]; United States v. Berry, 627, F2d 193 [9 Cir 1980], cert den 449 US 1113).

On the direct examination of each of the prosecution witnesses, the prosecutor elicited not only the fact that he had an agreement with the government (United States v. Edwards, 631 F2d 1049 [2 Cir 1980]), but also that he would not be prosecuted if he "told the truth" (A111) and that he agreed "to tell the truth" (A43, A77), all before an

issue of credibility was raised. Such bostering was improper (United States v. Borello, 766 F2d 46 [2 Cir 1985]; United States v. Jones, 763 F2d 518 [2 Cir 1985], cert den 474 US 981).

A defendant in a criminal case has an absolute statutory right to appeal (Coppedge v. United States, 369 US 438 [1962]).

The facts upon which the decision of the Court of Appeals was based are in substantial part erroneously stated. It is stated that the defendant "contends that the uncorroborated testimony of accomplices such as Cureton and Parris was insufficient to support the verdict" (United States v. Elusma, 849 F2d 76, 79 [2Cir 1988]). Cureton was an arranger as was Patricia Parris (who did not testify, and to whom obvious reference is made). Cureton testified that the couples were taken to defendant

because he was "cheap" (A 177). She did not testify as to whether or not the couples in question lived together after their marriages or to being present at their interviews with defendant. Her testimony and lack of testimony, on certain issues, support defendant. It is not her testimony about which defendant complains.

It is the testimony of the three citizen spouses about which defendant complains, not the arrangers. It is based solely upon the uncorroborated testimony of a single citizen spouse that defendant was convicted.

The Court of Appeals held that agents "need not preserve such notes ("Jencks Act" "statements") if the agents incorporate them into formal reports, which they did here on the day the interviews took place". There are four reports in question. Two are

undated and unsigned and two are dated and signed the next day (A 367, A364, A431, A457).

The Court of Appeals found that the trial judge found "no violaton of the Brady rule or Section 3500", a finding not made by the trial court. When the defendant later tried to raise the issue in the trial court, the trial judge found that the Court of Appeals had decided the issue (SSA 14). The defendant has been denied any consideration of the issue though he is entitled to same.

The cummulative error set forth in the within petition requires reversal (United States v. Wallace, supra).

> "While every criminal conviction is important to the defendant, there is a special poignancy and a corresponding responsibility on reviewing judges when, as here, the defendants have been men of blameless lives and respected members of a learned profes-

sion" (United States v. Simon, 425 F2d 796 [2 Cir 1970], cert den 397 US 1006)

CONCLUSION

It is respectfully submitted that the instant petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted, for the reasons set forth herein.

Respectfully submitted

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Dated: White Plains, New York
January 4, 1989

88-1543 (2)

Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

CHARLES F. DARLINGTON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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SDNY
WTPLAINS
BRIEANT 86 CR 779

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the city of New York, on the one Tenth day of June one thousand nine hundred and eighty-eight.

Present: Hon. James L. Oakes,
Hon. Amalya L. Kearse,
Hon. Richard J. Cardamone,

Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

-v.-

Docket Nos. 87-1519, 1525

ANGELO ELUSMA AND CHARLES F. DARLINGTON III,

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now

hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

VERDICT rendered June 2, 1987

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

86 Cr. 779-CLB

-v-

CHARLES F. DARLINGTON, III and

ANGELO ELUSMA

Defendants.

----------x

MEMORANDUM AND ORDER

UNITED STATES OF AMERICA,

-v- 86 Cr. 1017-CLB

CHARLES F. DARLINGTON, III,

Defendant.

----------x

Brieant, Ch. J.

Beginning on February 19, 1987, defendants Charles F. Darlington, III and Angelo Elusma, having been severed from their co-defendants in the above entitled two separate indictments, were tried before this Court and a jury. The jury was unable to reach a verdict, and was discharged. Thereafter, these defendants and their attorneys agreed with the Government that this Court should review the transcript when received, and make its findings of fact and conclusions of law in the nature of a bench trial based solely on the transcript of the trial which led to a jury deadlock.

The transcript was docketed in the District Court on May 20, 1987, and this Court has considered the matter, and now

makes the following findings of fact and conclusions of law pursuant to Rule 23 (c), F.R. Crim. P., with the same force and effect as if the February trial had been conducted as a bench trial.

THE INDICTMENTS

Familiarity of the reader with the two indictments is assumed. By 86 Cr. 779, filed in White Plains on September 11, 1986, Charles Darlington and Angelo Elusma, together with Arlene Cureton, also known as Arlene Beverly, also known as Arlene Charles, Denise Oliver, also known as DeDe Oliver, Patricia Parris, and Jean Louissaint were charged in Count One with having conspired together to defraud the United States and to violate

Title 18, United States Code § 1001 (false statements) and § 1546 (immigration fraud).

The conspiracy count charged in essence that defendants Cureton, Oliver, Parris, Elusma and Louissaint received money from certain Haitian aliens to enlist and recruit United States citizens to enter into sham marriages with the Haitian aliens for the purpose of enabling the Haitian aliens to obtain changes in their immigration status, knowing that the United States citizens would not live together with their purported Haitian spouses, and would not adopt other attributes of a genuine marriage. Among the means of the conspiracy were the filing by Attorney Darlington, or causing to be filed by the co-conspira-

tors, of documents, including Forms I-130 (Petition to Classify the Status of an Alien Relative for the Issuance of an Immigrant Visa), and Forms G-28 (Notice of Entry of Appearance as Attorney or Representative), which the co-conspirator defendants knew to contain false statements as to the residence, marital relationship or other personal data of the United States citizens and their purported Haitian spouses. Various sham marriages were pleaded as overt acts.

Counts Two through Eleven charge that Darlington and Patricia Parris filed false documents (I-130 and G-28) in ten separate immigration cases having to do with that many separate sham marriages between June 29, 1985 and February 14, 1986. Counts Seven and Eight were dismissed at trial.

Counts Twelve through Eighteen of 86 Cr. 779 Charge Darlington and Louissaint with filing similar false documents in connection with seven different sham marriages between March 28, 1983 and January 16, 1985. Counts Nineteen and Twenty charge Darlington and Elusma with filing similar false documents on January 15 and 31, 1985.

The Indictment in 86 Cr. 1017 was filed November 24, 1986, in the Foley Square Courthouse, and for convenience was referred to at the trial as the "second Indictment" or the "New York conspiracy."

In that Indictment, Darlington was charged in Count One in a separate conspiracy between November of 1984 and January of 1986 with Clyde Day, Michelle

Griffin and Bonita MacIntosh. This separate conspiracy was pleaded as having similar objects, and overt acts to that of 86 Cr. 779, but different co-conspirators. Furthermore, in Counts Two through Eight of that Indictment, Darlington was charged, together with Clyde Day, with having filed false and fraudulent Forms I-130 and Forms G-28 in connection with seven different sham Haitian marriages, and in Count Nine, with a separate false statement involving a sham marriage between defendant MacIntosh and one Leon Fanor, a Haitian. Count Two was dismissed at trial.

Cureton, Oliver and Parris have pleaded guilty and testified as Government witnesses at this trial. Michelle Griffin pleaded guilty. Bonita MacIntosh is a fugitive. Jean Louissaint

received a fortuitous severance when the Government failed to give timely notice of trial to his attorney. He was tried by a jury before Judge Stewart of this Court, and on April 27, 1987 was found guilty of one count of conspiracy and seven counts of making false statements. Clyde Day was tried separately before Judge Conner of this Court on April 9 and 13, 1987 in a trial without a jury, and by his findings and conclusions dated April 24, 1987, Judge Conner found Day guilty of one count of conspiracy and eight counts of making false statements.

IMMIGRATION PROCEDURES

The tawdry process by which adjustment of status can be obtained by an illegal alien, a process referred

to colloquially as "getting a green card," need not be described in great detail. Essentially, a person (the "beneficiary") who marries an American citizen may file, together with his or her spouse, Immigration Form I-130, seeking such relief. If the beneficiary is lawfully in the United States, a preliminary investigation in the nature of an interview will be held at the local office of the Immigration and Naturalization Service ("INS"). An illegal alien who has arrived in the United States without inspection by the INS and found his way into the underground economy, may proceed in the same fashion, except that the alien must go to a convenient Embassy or Consulate in a foreign country (usually Montreal for reasons of cost and distance), and apply

for a visa. Such applicants are interviewed briefly at the Consulate or Embassy to ascertain whether the petition is valid, and that there have been no changes in facts. All application on Form I-130 are presumed valid, and may not be rejected by INS, unless there is a reason to do so. The I-130 must also be accompanied by a certified marriage record, and birth certificate or citizenship papers of the American spouse.

As a matter of bureaucratic procedure, both the State Department, acting overseas, and the INS, acting within the United States, have concluded that it must be demonstrated that "the couple in question are in fact living together" (testimony of Halmo, Tr. 51). This is elicited by interviews seeking circumstantial matter, which only a spouse

would know; the applicant and his or her citizen spouse, are inquired of separately as to such significant matters as the color of the tile in the family bathroom, or the draperies in the bedroom. See generally Stokes v. United States, 393 F. Supp. 24 (S.D.N.Y. 1975).

As was to be expected, these procedures almost invite widespread fraud and evasion, and have provided fertile ground for practicing lawyers specializing in immigration matters, who counsel spouses and beneficiaries of the I-130 procedure. Some such applicants are, of course, entirely legitimate insofar as concerns their marriages and their aspirations to adjust their status in the United States. Often it is difficult for an attorney to know whether the client is a legitimate applicant or one

seeking to perpetrate an immigration fraud. Legal services so rendered have included preparation of a crib sheet for interviews (GX 80), and counseling to the effect that while the statute does not so state, an adjustment of status based on a marriage simply will not fly unless the spouses are "living together." See generally United States v. Diogo, 320 F.2d 898 (2d Cir. 1963), reaffirmed in United States v. Assi, 748 F.2d 62, 68-69 n. 10 (2d Cir. 1984).

With such a fertile field for perjury, it was only a matter of time before conspiracies of the sort alleged here would come into being.

CHARLES F. DARLINGTON, III AND HIS LAW PRACTICE

After proving his good character and reputation at the bar and in the com-

munity for truth and veracity, defendant Darlington testified in his own behalf at trial. He had no prior criminal record, and showed himself to be a pillar of the community and fine family man, although apparently no more than adequate as an attorney.

Following education in Westchester County and in England, he served in the United States Army in Germany, and obtained a law degree in New York State in 1965, where he was admitted to the bar in March of 1966.

After a brief period of work with a title insurance company, Darlington was employed as a trial attorney for a New York City law firm which was house counsel to a major casualty insurance company. He served briefly as an Administrative Assistant to the Hon. Hugh Coyle

in the Westchester County Supreme Court, and was employed briefly with the law office of James Dempsey in White Plains, where personal injury litigation was the mainstay. His career included a stint as a general practitioner in Scarsdale, a term as Scarsdale Village Prosecutor, and in 1976 he returned to New York City with a law firm specializing in the defense of medical malpractice cases.

In 1977, Darlington returned to White Plains as a single practitioner, largely in the field of matrimonial and criminal law. There were few, if any, lawyers in the area specializing in immigration law at the time. Fortuitiously, he was introduced to clients requiring immigration services as a result of an acquaintanceship formed with a Spanish interpreter he met while defending a

Spanish speaking robber. Interested in entering the immigration field, Darlington studied Spanish in order to do so, and had his first immigration case in October of 1979.

Darlington's immigration practice grew, so that by 1983 he had one full-time secretary and a part-time secretary. During the period covered by these Indictments, he had 15 full-time employees, and two part-time employees. This staff included three full-time attorneys, and occupied the entire eighth floor at No. 199 Main Street, White Plains, New York, formerly known as the Bar Building. One of these employees was Marie Alphonse, discussed infra.

Darlington testified, and there is no reason to doubt him, that at the time of trial he had 1,776 active immigration

files, and about 1,800 more "inactive" files. Ninety percent of the practice consists of Hispanic clients, and the office had five Spanish-speaking employees, in addition to Darlington. Haitian cases were no more than five percent of the entire caseload, and the only employee speaking French or Creole, was Marie Alphonse.

Darlington testified that only 10% of his cases were "marriage cases," and there is no evidence to the contrary. Although the office records and files which came into evidence at the trial appear somewhat sloppy and incomplete, reflecting a poorly managed office that was too busy, there is no reason to suspect any impropriety on the part of Darlington in connection with his Hispanic immigration practice. As may be seen,

the cases presented at the trial are an extremely small portion of the total business done in the office. However, the significance of the law practice is not to be underrated, because at an average fee of from $600 to $800, the pending cases when completed would have a total gross fee value of between $1,065,600 and $1,420,800.

Further information about the office was developed at trial, both through the Government witnesses, and defense witnesses. Essentially, the fees charged by Darlington were on the low side of a reasonable range, and it is reasonable to infer that Arlene Cureton told the truth when she said that Darlington was selected as an attorney for the applicants because he was cheap. (Tr. 138-39).

When cases seeking adjustment of status by means of Form I-130 came into the office (predominantly, but not limited to marriage cases), a so-called "intake procedure" was followed. A paralegal was usually present during the initial interview. Usually, but not always, in the Haitian cases after November 1984, this work was done by Marie Alphonse, who was the only Creole-speaking employee. Most of the applicants lacked fluency in English. For bureaucratic reasons, the Form I-130 was in short supply, and had to be picked up in Manhattan two at a time when needed. The intake interview was limited to questions necessary for filling out the I-130 forms, and assembling the supporting documents, such as birth certificates, and marriage certificates. Because the official forms

were in short supply and many of the witnesses were recently married, it was Darlington's practice to have the sponsor citizen, usually a newly married wife, sign her married name several times for practice, and then to sign the I-130 form in blank, at the same time the G-28 Form was signed.

A down payment on the legal fee was obtained, and a file opened. Receipts for the fees, usually paid in cash, were given by Darlington and carbon copies of the receipts maintained in the client's office files.

Seldom did an applicant have all of the necessary supporting documents. Newly married couples would never have all the necessary documents because the only certified marriage record which would be acceptable would be one obtained

from the City or Town in which the marriage license had been issued. Such documents cannot be issued until the Clergyman or other person officiating at the marriage returns the form to the issuing office, and in many places, a backlog exists in obtaining certified copies. At one time, during the Indictment, the City of Yonkers was six or seven weeks behind in issuing certified marriage records. (Tr. 1150).

There was no use filing the I-130 petitions until all supporting documents were obtained. For this reason, they were piled up and were typed later on, when all supporting documents were available.

Darlington permitted a sloppy office practice to grow up in which the documents as typed were dated not on the

date on which they were actually signed in blank, but rather on the later date on which they were actually typed. This had an embarrassing result, at least in the case of Derek Von Alvarez, one of whose documents was dated as having been signed in Darlington's office in White Plains, on a day on which he was in fact incarcerated on Rikers' Island. (Tr. 738).

While this postdating may have been the product, at least in part, of a motive to deceive the authorities, since few newly married couples go directly from their wedding to the lawyer, this particular fraud is not charged in the Indictment here, and on balance, the Court is convinced that it is just as likely as not, that the dating practice simply grew up in a sloppily run law

office; that the practice was followed as well on documents in cases where the marriage was of long standing and not subject to question. Darlington, himself, when he prepared such documents, sometimes dated them as of the current date, when he could not remember the actual date on which they were signed. The Court believes on balance that a fair trier of the fact must regard this particular conduct of postdating the documents as essentially innocent. While the misdating of documents is beneath the dignity of a practicing lawyer, the Court declines to draw an inference of guilt on any count from the misdating practices standing alone.

THE CONSPIRACY COUNTS

The Government proved beyond a

reasonable doubt that there existed, during the time period mentioned in the respective indictments, two separate conspiracies, one led by Jean Louissaint and Arlene Cureton, and located essentially in Westchester County, and the other led by Clyde Day, and located primarily in Manhattan and the Bronx. In each of these conspiracies the object was to obtain adjustment of status for Haitian aliens by bringing the Haitians, comprised of mostly, but not entirely, men, into contact with American citizens, mostly welfare recipients, for the purpose of entering into a marriage for money, followed by a trip to Darlington's law office, usually on the same day as the marriage was performed, to retain Darlington to secure the immigration benefits expected to flow from the

marriage. In each case arranged by the conspirators there was an understanding, usually explicit, that the American citizen spouse would not be expected to live with the Haitian national, and there was no semblance of holding out to the public as husband and wife. Most of the welfare recipients continued to receive their allotments and live where they were. Many of them had "boyfriends" with whom they continued to consort. None were supported by their Haitian spouses. They retained their names and did not (with one exception) file joint tax returns with the Haitians or maintain joint finances, nor did any of the other common attributes of a marriage come into being.

The frequent use of the expression "sham marriage" in the trial record and in these findings, requies some elabora-

tion. In the context of this case, there is no such thing as a "sham marriage" if the term is to be treated as equivalent to a "void" marriage. New York has twice, by legislation, abolished common law marriages. A marriage made in New York is valid only if it is a ceremonial marriage pursuant to a "license to marry" performed by a clergyman or designated public official, with some minor exceptions. See generally New York Domestic Relations Law § 11. Licenses to marry are issued by the Town Clerks of each Town in the State, and by the City Clerks of each City. Residence of either party within the licensing municipality is not a prerequisite for obtaining a marriage license. An official form is required which contains the written declarations of the groom and bride. The official

issuing the license may, depending on his or her diligence, examine birth certificates and/or prior divorce decrees to ascertain whether a marriage license may issue, and questionable applications are occasionally referred to the Town or City Attorney. A blood test is required, unless waived by court order, and there is a 24 hour waiting period after issuance of the license before a marriage may be performed.

After performing the marriage ceremony the clergyman or official endorses the license, together with the signature of the witnesses, and certifies that the marriage was performed at a particular time and place. It is the responsibility of the clergyman or official to return the license with his certification to the Town or City Clerk which issued the li-

cense. In order to comply with immigration requirements, the applicant must thereafter receive from the City Clerk or Town Clerk, a certified copy of the license application and certificate of officiating person.

New York recognizes a marriage so made as valid, and it can only be terminated by a judgment of divorce, the death of one of the parties, or a judgment of annulment, based on statutory grounds, including fraud in the inducement.

Each of the "sham" marriages which were the subject of this trial, were valid marriages under New York law, performed by authorized persons in possession of marriage licenses, although in a few situations the person being married was using a false identity.

A person so validly married would

have the legal right to sponsor his or her alien spouse for adjustment of status by use of the I-130 Form. The INS has placed a gloss on the statute by requiring applicants to demonstrate that the marriage is bona fide and subsisting at the time that the application is ruled on, and has taken a position that if the parties do not "live together," the marriage is "sham" and does not entitle the alien to any benefits. This position has apparently been sustained in reported cases, although many examples will come to mind of a valid marriage by people who intend to be married and hold themselves out as such, and yet do not live together. We mention in passing the Hollywood starlet married to the New York financier, people in the military or diplomatic service posted at inhospitable

or unsafe places, the spouse whose country will not grant him or her an exit visa because of some opposing political views, therefore keeping a married couple separated, and other similar examples will readily come to mind.

Although the Government proved the existence of these two conspiracies, and proved that numerous persons, mentioned in greater detail below, were members thereof, this Court finds that there is a reasonable doubt as to whether defendant Darlington became a member of either or both of the conspiracies during their existence, with full knowledge of their objects, making them an activity which he wished to succeed.

We must and do approach this issue as a trial juror. While proof of motive is not an essential part of the Govern-

ment's case, absence of motive may be considered by the trier of fact.

Darlington had no motive to become a part of a conspiracy to effectuate sham marriages for Haitian aliens as charged herein. He had a flourishing immigration practice, indeed, his practice was far larger than his talent and support facilities could accommodate. He charged fees at the low range of reasonableness to all his clients, and charged no more money for the cases processed through Day and Louissaint than he did for legitimate applicants. Although Darlington understandably denies it, there is proof in the record that out of his fees, Darlington tipped Clyde Day on at least one occasion, or gave him a cut of the legal fee, and Clyde Day explained to one American spouse, Crystal Hall, his prac-

tice of taking the newlyweds to White Plains by the fact that he was getting a cut of the fee. (Tr. 646). Cureton explained her use of Darlington by the fact that he was cheap. (Tr. 138-39). Darlington, for his part, denied that he even knew Clyde Day. (Tr. 1239). This testimony is incredible.

Intrinsically there is nothing wrong about an attorney obtaining referrals of cases from prior clients or friends of prior clients. The uniformity of the procedures followed in each case do not themselves suggest guilt; they are apparently consistent with the procedures followed in the Darlington law office generally, during the period of time with which the Indictments are concerned, and, indeed, similar practices are probably followed in other law offices engaged in

the same specialty.

Furthermore, a reasonable trier of the fact would expect that a person situated as was Darlington, and knowingly and willfully engaging in the commission of a crime, would get more money for himself out of the conspiracy than he would expect to receive from his concurrent legitimate immigration practice, rather than less money. The procurers of the marriages received relatively nominal amounts of money, ranging from $100 to $500, paid by the hardworking Haitians, and the American spouses received payments ranging from $900 to $2,000. On the proof before me, there is no sign of any extra money which could have found its way from the Haitians to Darlington, so that in effect the trier of fact is asked to infer that, for the privilege

of being crooked, Darlington was working cheaper than he did in connection with his regular, legitimate cases. This seems unreasonable.

The Court also declines to rely on GX 80 and 81. As a threshold issue, these exhibits are not associated directly with any specific wrongdoing. GS 80 is a set of questions apparently assembled as a result of debriefing persons who have been interviewed by Immigration, or at an American consulate. That a client should be informed in advance of the context of the interview is not, at least under the present state of the law, evidence of misconduct on the part of an attorney, and the Court believes it is generally understood that attorneys will prepare their clients for such interviews so that they will not become nervous or

forgetful or lose a valuable right by reason of being unprepared. The last paragraph of GX 80 may reflect adversely on its author, but it is not criminal, and its presence in the exhibit is not regarded by this Court as evidence of guilt.

GX 81, which lists 20 questions most often asked about immigration, is likewise not regarded as any evidence of guilt, and the Court has drawn no inference adverse to Darlington in connection therewith. Moch of the advice given was essentially true, and merely reflects the fact that the present immigration laws do not enjoy very much public support.

Last, and probably most significant in the enumeration of the factors which compel the Court to have a reasonable

doubt as to Darlington's knowing and willful membership in the conspiracies was the conduct of many of the spouses. Upon being taken to Darlington's office, they were directly told by the co-conspirators, in most cases, to tell Darlington that they were living together. Furthermore, the co-conspirators who took the newlyweds to Darlington's office at White Plains, frequently attempted to debrief them on their return from the office to the taxicab or limousine which had been used to take them there. This recurring practice was dismissed by the prosecutor in his argument to the jury on a theory that Darlington was attempting thereby, through the co-conspirators, to create a facade of deniability. This is, of course, a logical argument. However, absent some evidence to support such an

inference, it is an equally likely equally likely inference that, as Darlington claimed at trial, the Louissaint conspirators went to him because he was cheap. It is also an equally likely inference that the Day conspirators did so because Day could get a kickback on the legal fees; also that the spouses were pretending the marriages were legitimate in order to conceal their wrongdoing from Darlington, as well as from the INS.

Persuaded by the foregoing, the Court finds defendant Darlington Not Guilty on Counts One of 86 Cr. 779 and 86 Cr. 1017.

ANGELO ELUSMA

Angelo Elusma is found Guilty on Count One of Indictment 86 Cr. 779. As to Elusma, the Governemnt proved beyond a reasonable doubt that he conspired with

Arlene Cureton and others to provide the Haitian participants in at least two sham marriages for the purpose of defrauding the INS. His actions pleaded as overt acts (e) and (h), both of which were proved beyond a reasonable doubt, were in furtherance of the conspiracy. He transported several of the couples without cost and knowingly procured the sham marriages made for money which are referred to in Courts Nineteen and Twenty of Indictment 86 Cr. 779. He acted knowingly and willfully, and, by his actions, particularly in bringing Haitian clients Absolu and Pierette to meet their American brides, made the conspiracy something which he wished to succeed. He knew that the parties to these marriages would not live together, and that the sole purpose of the marriages was to obtain adjustment of

immigration status.

Elusma proved his good character and testified in his own behalf. He denied (falsely) he had been to Cureton's home, said that it was his cousin Pierrette, rather than Cureton, who introduced him to Denise Oliver, and sought to explain his participation in the Pierrette wedding as merely that of a cab driver. He also said that it was Absolu (also a cousin) who first introduced him to Sonya Faulkner, Absolu's American bride, rather than Cureton, and that he merely acted as a driver at Absolu's request. His testimony is incredible. On cross-examination he passed off as mere coincidence the fact that he had witnessed three separate sham weddings with Cureton as the other witness, and conceded that he had made false exculpatory statements to the

arresting agents. His testimony does not impair the Government's proof at trial which established beyond a reasonable doubt his knowing and willful membership in the conspiracy.

CONSCIOUS AVOIDANCE

Before we turn to the individual substantive counts charged in the two Indictments, some elaboration is necessary on the subject of proof of conscious avoidance of the truth as a means of proving knowledge of falsity.

The element of knowledge is of some considerable importance in this case. It is settled law that a defendant cannot avoid a finding of guilty knowledge by claiming that he closed his eyes to what was going on around him. United States v. Hanlon, 548 F.2d 1096, 1101 (2d

Cir. 1977). The scienter standard for the crime of filing false documents or making false statements may be satisfied by proof beyond a reasonable doubt that a defendant made a statement with deliberate disregard of whether the statements made were true and with a conscious purpose to avoid learning the truth. See United States v. Precision Medical Labs, Inc., 593 F.2d 434, 445 (2d Cir. 1978). However, guilty knowledge may not be found if a defendant actually believed that the statements he made were true. United States v. Bright, 517 F.2d 584, 587 (2d Cir. 1975). Such belief in the truth of the statements will be presumed in the absence of evidence to the contrary.

Proof of "conscious avoidance" offered in the trial of the instant In-

dictments relates to defendant Darlington's state of mind when he prepared, signed and filed certian INS documents. The element of guilty knowledge of the falsity of a Form I-130 filed with respect to a particular sham marriage may be satisfied by proof of Darlington's awareness of a high probability of falsity, unless countered by proof that Darlington actually believed the document was truthful. See United States v. Cano, 702 F. 2d 370, 371 (2d Cir. 1983).

In applying the law of conscious avoidance, the Court is careful not to impose any greater obligation on Attorney Darlington to discover the truth than would be imposed on the layman. The Court is mindful of the caveat stated in United States v. Maniego, 710 F. 2d 24, 28 (2d Cir. 1983) (per curiam), that "an

attorney is not held to a higher standard of conduct, or legal obligation, to verify independently the truth of the information given by a client." See also United States v. Sarantos, 455 F. 2d 877, 881 (2d Cir. 1972). An attorney has the right to rely, in good faith, on factual representations made to him by clients, if he actually believes such representations. Mere negligence or even foolishness by an attorney with respect to a client's statements cannot establish guilty knowledge. The activities of an attorney in filing documents for a client, such as an application for adjustment in immigrant status, do not take on any illegality unless the Government proves beyond a reasonable doubt that, at the time of preparation and filing, either the attorney knew that such application

was false, or the attorney deliberately disregarded the probably falsity and acted with a conscious purpose to avoid learning the truth.

Of course, if a client told Darlington something that rendered the documents filed with the INS false, actual knowledge will be inferred.

THE FALSE STATEMENT COUNTS

We turn now to consider the individual substantive counts. As to these, it seems more convenient to proceed chronologically. The first such count (Count Twelve of 86 Cr. 779) concerns the marriage of conspirator Arlene Cureton to Celiter Charles on March 11, 1983. This marriage was arranged by Louissaint. Ms. Cureton, who had legitimate employment at the time of the trial, was living in 1983

in New Rochelle, New York, where she was receiving public assistance. She married Celiter Charles on March 11, 1983, having known him for about a week. A friend of hers had introduced her to Jean Louissaint, who in turn introduced her to Celiter Charles. The friend, named Max, and not otherwise identified at trial, asked Cureton if she wanted a business marriage "for a Thousand Dollars, and for him to get his green card." Max told Cureton she did not have to live with her husband. Max then introduced her to Louissaint at the White Plains railroad station, where Louissaint, like Elusma, operates a taxicab.

Louissaint identified Charles as his brother, and told Cureton that they did not have to live together. Louissaint took the bride and groom for their

blood tests in his taxi, drove them to City Hall in White Plains for a marriage license (GX 1). Louissaint drove the bride and groom, together with another witness, to the office of the Mayor of Port Chester, who officiated at a marriage ceremony. Following the marriage ceremony, with no reception and no honeymoon, Louissaint took the bride and groom directly to Darlington's law office in White Plains in his taxicab. This scenario is relatively standard and repeats as to many of the substantive counts.

Cureton testified that en route to Darlington's office, Louissaint told Cureton and her new husband that he had dealt with Darlington before, and "if Darlington asks us were we living together, to say yes." (Tr. 90). There is no reason to disbelieve this testimony.

Darlington interviewed the newlyweds in his office in the presence of Jean Louissaint. He advised them to have a joint bank account and tax returns. He also asked them if they were living together, and Cureton answered in the affirmative. She signed the I-130 form on March 11, 1983 in Darlington's office. This form (GX 4) represented to the Government that the parties resided at 87 Maple Street in White Plains. This was untrue. Before signing the petition, Darlington required Cureton to practice signing her married name, and although she signed the petition on March 11th, it was notarized by Darlington under date of March 15th, apparently the date on which it was typed. Cureton went downstairs, entered Louissaint's cab, and was paid $500 by Louissaint out of the money,

which he in turn had received from Celiter Charles. When the petition was ultimately granted by INS, Ms. Cureton received $500 more. In May, 1985 she became divorced from Charles. The money was so easy that she then appropriated Max's business relationship with Louissaint, and entered into the business of arranging marriages for Haitian nationals for money, with Louissaint as her co-conspirator. In this partnership in crime, the division of responsibility was such that Cureton found the American nationals to get married, and Louissaint produced the Haitians.

The marriage of Cureton and Charles is the basis for Count Twelve in Indictment 86 Cr. 779. This is a false document count under 18 U.S.C. § 1001, and the Government must prove as to the forms

I-130 and G-28 for the Cureton/Charles immigration case, scienter on the part of Darlington, at or prior to the time that he filed these papers with INS, that the marriage was sham in that the parties were not living together and did not intend to do so. The factual information required to support such an inference in the context of this case would be met by proof of knowledge or conscious avoidance of the fact that the parties were not living together and holding themselves out as man and wife.

Based on the proof at trial, it has not been demonstrated beyond a reasonable doubt that Darlington acted knowingly and willfully in filing a false statement for Celiter Charles. His clients had represented to him that they were living together, and they were, in fact, married.

Darlington is acquitted of Count Twelve.

* * *

The next Count chronologically has to do with the marriage of Valli Duckett, an American, to Wilsauce Alexandre, a Haitian. This marriage took place on March 27, 1984. It was arranged by Louissaint and Cureton, and Louissaint drove the bride and groom to Darlington's office on their wedding day. Louissaint had asked Cureton to find a girl to marry Wilsauce Alexandre, and she produced Ms. Duckett, a welfare recipient, who at the time was living with Cureton in New Rochelle.

The first conversation between the couple was direct and simple. Alexandre asked Duckett if she wanted to marry him for a Thousand Dollars to get him his

green card. Cureton told Duckett and Alexandre that they didn't have to live together. The same routine followed in Cureton's own marriage, of going for blood tests, marriage license and the wedding, was followed again. The bride and groom accompanied by Cureton and Louissaint went to White Plains for the blood test and the marriage license, and they were married by the Mayor of Port Chester in the presence of Louissaint and Cureton.

On that day, Cureton, Duckett, Louissaint and Alexandre entered Darlington's law office together, and followed essentially the same procedures which had been followed in the case of the prior marriage of Cureton to Charles. The forms were signed in blank after Darlington had asked Duckett to practice

writing her married name. After leaving the law office, Louissaint paid Duckett $500 in the parking lot. This money came from Alexandre.

During the interview at Darlington's office, Jean Louissaint answered the questions. Valli Duckett testified that she did not tell Darlington that she and Alexandre were living at 127 Fisher Avenue in White Plains, the marital address entered on the Form I-130 (Tr. 576), and indeed, she never did live there or anywhere else with Alexandre following the wedding. Although the I-130 Form was signed in blank on the day of the wedding, it was later dated in Darlington's office as March 28, 1984. This marriage is pleaded as Count Thirteen in Indictment 86 Cr. 779.

Based on the proof at trial, it has

not been demonstrated beyond a reasonable doubt that Darlington acted knowingly and willfully in filing a false statement for Wilsauce Alexandre. His clients were in fact married. The Court infers that the address of the marital domicile was furnished by Louissaint in the presence of Duckett and Alexandre. Darlington is acquitted of Count Thirteen of 86 Cr. 779.

* * *

The next marriage in point of time was that of Mozella Brown with Raroul Joseph, Count Fourteen of 86 Cr. 779. This marriage took place on June 5, 1984. Jean Louissaint produced Raroul Joseph, a Haitian national and Arlene Cureton produced Mozella Brown to be the spouse.

Ms. Brown also resided with Cureton, and was a welfare recipient. Cureton asked Brown whether she would "want to get married to a Haitian so he could get his green card" (Tr. 255), and told Brown that she would not have to live with the Haitian, and would receive money.

Jean Louissaint thereafter introduced Brown to Joseph and, accompanied by Cureton, took them to White Plains to get a blood test, and also to get a marriage license. On June 5th, the earliest possible date, Louissaint took Cureton, Brown, Joseph and a witness for Joseph to the Mayor of Port Chester to be married. Thereafter the newlyweds went to Darlington's office in White Plains. Apparently Louissaint remained in the taxicab, and Cureton and the clients went to the office.

In this interview, Darlington asked Brown whether she and her husband were living together, and she answered "No". Thereafter, Cureton either kicked her under the table (Tr. 260), or nudged ("hunched") her (Tr. 144), and Brown changed her answer to "Yes".

The Form I-130, was not postdated. As filed by Darlington it listed the parties as residing together at 15 Dobbs Ferry Road, White Plains, New York.

This Court presents a closer question. The Court, as trier of the facts, must make some allowance for all of the ordinary problems which affect human understanding of interpersonal communications, and particularly the fact that in the initial client interview in a law office, it is possible that questions are misunderstood, answered incorrectly,

and then voluntarily corrected. The proof is not clear that Darlington actually saw Ms. Brown get kicked or "hunched" by Cureton.

Based on the proof at trial, it has not been demonstrated beyond a reasonable doubt that Darlington acted knowingly and willfully in filing a false statement for Raroul Joseph. Darlington is acquitted of Count Fourteen of Indictment 86 Cr. 779.

* * *

The next marriage took place ten days later, between Yolanda Smith and Sonnaire Celestin, charged as Count Sixteen of 86 Cr. 779.

Ms. Smith, also a welfare recipient, was asked by Cureton, her cousin, whether she wanted to get married

for money. Smith knew that she was not expected to live with her husband following marriage. Louissaint brought Haitian Sonnaire Celestin, who barely spoke English, to Cureton's home, and introduced the couple. He took them to White Plains for a blood test, and also for a marriage license.

This couple was married in the Town of Greenburgh on June 15, 1984, and was taken to the wedding by Louissaint, accompanied by Arlene Cureton and one Moody, a friend of the bride. This case was unusual in that the couple went to Darlington's office before the marriage. The interview at Darlington's office started off on a friendly note, when Darlington greeted Cureton by saying, "oh, it's you again." Smith's testimony is as follows (Tr. 538):

"Q: Did Mr. Darlington ask you any questions?

A: Yes.

Q: What did he ask you?

A: Would we be living together?

Q: What did you say?

A: We laughed.

Q: Who is we?

A: Me and Arlene.

Q: What happened when you laughed.

A: He [Darlington] said 'You don't have to convince us, you have to convince Immigration.'"

Smith did not tell Darlington that she was living with her husband. Darlington suggested that the parties should get a bank account together, pictures and a wedding ring. While they did not directly tell Darlington they had not yet

been married, Smith did tell Cureton to finish the interview so that she could get married. Smith signed the blank applications, which were later typed in to show that the couple resided at 50 Battle Avenue in White Plains, New York.

On leaving Darlington's office, the parties were married in Greenburgh by a clergyman.

Smith and her husband were interviewed at Darlington's office about a month later, in preparation for an interview with Immigration. They met Darlington at the office of INS in Manhattan, and in the course of the interview, as Smith eloquently expressed it (Tr. 547): "We messed up." The interviewer invited Smith to sign a paper stating that the marriage was not genuine, and threatened that if she failed to do so, and the

Government found out otherwise, they could go to jail. After the interview was over, Smith told her husband, in the presence of Darlingotn, "Your black ass is going to jail." Darlington told her to calm down and said that "we had to get it together for the next interview." (Tr. 549). At that time she told Darlington that she was not coming back for the second interview, and he told her that she had to come back. (Tr. 550).

The interview was rescheduled and on the rescheduled interview, Smith left Darlington and Celestin waiting for her in the INS building. She told them she had to go to the bathroom, and instead got on the elevator and never returned. (Tr. 548).

Darlington obtained a judgment of divorce (GX 19) for Sonnaire Celestin on

April 10, 1985.

This Count presents a very close question. The Court notes, however, that at a pre-trial interview with government agents, Smith told them, and later conceded on cross-examination at trial (Tr. 556), that Cureton had told her in advance of the interview, that she should "tell Mr. Darlington that you and your husband were living together." On balance the Court concludes that there is a failure of proof beyond a reasonable doubt of scienter on the part of Darlington at the time that he filed the documents referred to in this Count. Darlington is acquitted of Count Sixteen in Indictment 86 Cr. 779.

* * *

Valli Duckett, discussed earlier as a green card bride in Count Thirteen of 86 Cr. 779, married a second Haitian for money only a few months later. Using the name Cheryl Cofield, Duckett married Merius Alcy, charged in Count Fifteen of 86 Cr. 779. Cheryl cofield was a friend of Valli Duckett. At the request of Cureton and Duckett, Ms. Cofield agreed to allow Duckett to use her name and birth certificate to marry Alcy. Louissaint brought Alcy to Cureton's home and told Alcy that Duckett was Cheryl Cofield.

The usual procedures of the conspirators were followed here. Louissaint took Alcy and Duckett-Cofield to White Plains for the blood test, and also for the marriage license. Thereafter, the parties were married on July 3, 1984, by

the Mayor of Port Chester in the presence of Cureton and Louissaint. It will be remembered that the Mayor had previously married Duckett to Wilsauce Alexandre on March 27, 1984, also with the same two witnesses. If the Mayor, who did not testify at trial, noticed the identity of the bride or witnesses, he did nothing to so indicate.

Leaving the wedding ceremony, the parties went directly to Darlington's office in White Plains, and entered together with Louissaint and Cureton. Duckett-Cofield was wearing sunglasses as a form of disguise. The secretary, in the presence of Darlington, said "haven't I seen you before?" and Darlington said, "It is not who you think it is." (Tr. 583).

In the law office as well, the cus-

tomary procedures were followed, and the Form I-130 as ultimately filed, showed 87 Maple Street, White Plains, New York as the place of residence of the couple. This document was dated July 18, 1984, although signed on July 6th. Duckett-Cofield testified that she never told Darlington that she was living at that address, and in fact, never lived with Alcy there or anywhere. She was living in New Rochelle with Cureton at the time. Duckett-Cofield also testified that she did not remember what questions Darlington addressed to her, to Alcy, or to Cureton, who was present at the interview. (Tr. 583-84)

As to Duckett-Cofield's marriage to Alcy, there is insufficient evidence to prove scienter beyond a reasonable doubt, and Darlington is acquitted of Count Fif-

teen of 86 Cr. 779.

* * *

The next Count in point of time is Count Eighteen of 86 Cr. 779, involving Albert Eric Scott, also known as Albert Thomas, an American citizen, and Merita D'Haiti, a Haitian woman. This marriage was also procured by Louissaint and Cureton, and on July 9, 1984, the same day of the wedding, Louissaint took Scott-Thomas and his wife to Darlington's office. This American bridegroom was, at the time of the trial, a state prisoner in Fishkill Correctional Facility, serving a term of imprisonment for assault. He had a lengthy prior criminal record. The bride, Merita D'Haiti was represented as being Louissaint's sister. Louissaint

offered $1,000 to Scott-Thomas to "marry his sister so she could become a citizen." (Tr. 622)

Louissaint took Scott-Thomas to White Plains for blood tests, accompanied by Cureton and Valli Duckett, Cureton's son and Scott-Thomas' brother, who was the father of Cureton's son. A later trip was made by Scott-Thomas to White Plains City Hall. He was dropped off there by Jean Louissaint in the taxi, and was again accompanied by Cureton, Duckett and Scott-Thomas' brother. Scott-Thomas used the name of Albert Scott to be married. He testified that he had birth certificates both in the name of Scott, which was his mother's maiden name, and in the name of Thomas. He was married in Port Chester.

During the Scott-Thomas/Merita

D'Haiti consultation at his office, Darlington indicated a familiarity with Cureton, and because Merita D'Haiti was Louissaint's sister, Darlington agreed that he would charge the same fee for the services as theretofore, although the charges at the office were being increased.

Scott-Thomas testified, and I find, that in the interview, Darlington asked him where he was living, and he gave the address of 70 Horton Avenue in New Rochelle. During the same interview Merita D'Haiti told Darlington that she was living at 137 Fisher Avenue, White Plains. According to Scott-Thomas, Darlington said nothing when he and Ms. D'Haiti gave different addresses. The usual documents were signed in blank. They are GX 55 and 56. GX-55, which is Form I-130

was dated July 10, 1984 and signed by Albert Scott. It listed the address of 70 Horton Avenue, New Rochelle, New York 10801, as being the place in the United States where the petitioner and spouse last resided together. Thomas testified, and I find, that he never lived with Ms. D'Haiti at any address, and never told Darlington that the parties were living together at that address, or at any address. Here again the document was post-dated, apparently in the handwriting of Darlington, on the date immediately following the date of the visit of Scott-Thomas to the office.

After the interview, Louissaint transported Cureton, Scott-Thomas and Merita D'Haiti to the railroad station, and give Thomas $500.

The Court finds the testimony of

Albert Thomas credible on the subject of his conversation with Darlington. Notwithstanding his prior criminality, I found him to be truthful and sufficiently detailed in his testimony. His demeanor was candid and his credibility was unshaken on cross-examination.

Darlington denied (Tr. 1155-56) that any witness at trial other than Mozella Brown or Michelle Griffin (Tr. 1151), or Sherry Butler (Tr. 1152), told him they were not living with their spouses. However, he did not specifically refer to Albert Scott-Thomas or Merita D'Haiti in his testimony. Marie Alphonse was not employed by Darlington when this filing took place. (Tr. 1017).

The Court concludes, on all the evidence before it, that the Governemnt has proved as to Count Eighteen of 86 Cr.

779 that Darlington knowingly and willfully filed the Form I-130 therein referred to, and also the Form G-28 (GX 55 and 56) and that GX 55 contained a false statement, which was known to be false when made, namely that the parties had resided together at 70 Horton Avenue in New Rochelle. The Court finds Charles F. Darlington, III Guilty on Count Eighteen of 86 Cr. 779.

* * *

On November 17, 1984, Sonya Faulkner, using the name of Shawna Spady, married Louis Duquesne Absolu. These clients did not go to Darlington's office until a week following the ceremony. This, Count Nineteen of 86 Cr. 779, is the first substantive count in point of time

involving defendant Angelo Elusma. Ms. Faulkner was introduced to Absolu by Angelo Elusma and Arlene Cureton. Cureton asked her if she would marry Absolu for $500 so that he could get his green card. Cureton told Ms. Faulkner that she did not have to live with her husband. This occurred in the presence of Elusma, who had brought Absolu to Cureton for the purpose of effecting a marriage for money to obtain an adjustment of immigration status.

In October 1984 when this scheme was first broached to Ms. Faulkner, she was less than 18 years old, and was unable to marry without parental consent. See New York Domestic Relations Law § 7. To rectify this situation, she asked her older friend Shawna Spady whether she could borrow Shawna Spady's birth certi-

ficate. She did so and then married Absolu under the name of Shawna Spady.

The usual procedure of the conspiracy was followed.

As to this marriage the proof showed that Cureton, Elusma and Deborah Hayes, then using the name Irene Chambers, who had a double wedding with Faulkner, went to White Plains together Faulkner to get their blood tests. This was the first time that Ms. Faulkner had met her husband, Absolu. Angelo Elusma took the participants to Mt. Vernon City Hall for a marriage license, and on the following day, drove the participants to Greenburgh to be married. Elusma and Cureton signed as witnesses to the marriage. They thereafter went to Ferris Avenue, where Absolu lived, and Arlene paid $500 to Faulkner. About

a week later, she and Absolu visited Darlington's office. They met him alone with a French interpreter, which the Court infers to be Marie Alphonse.

In the course of the conversation, Darlington offered to read a newspaper article concerning difficulties experienced in an immigration case arising out of the contention that a marriage was false, but Absolu "cut him short and told him that we were married for love." (Tr. 328). The usual procedure of practicing the married signature and signing the paper in blank then followed. The document, signed in blank, indicated joint residence of the parties at 23 Midland Avenue, White Plains, New York. Neither Faulkner nor Shawna Spady had ever lived with Absolu at that address or any other address.

There was no evidence that Darlington knew that the representations made to him by Absolu to the effect that the parties were living together (Tr. 335) and married for love, were known to be false by Darlington.

The record as to this marriage fails to show proof beyond a reasonable doubt of scienter on the part of Darlington, and he is acquitted on Count Nineteen of 86 Cr. 779.

The trial record concerning this marriage is sufficient to prove beyond a reasonable doubt that Angelo Elusma participated in the arrangements for this sham marriage and understood the fact that money had passed and the sole purpose of the marriage was to satisfy Immigration. The Court infers beyond a reasonable doubt, on the entire factual

context, that he did not expect the parties to live together as husband and wife. While the transportation was done by Elusma's taxicab, no taxi charges were paid by anybody. He aided and abetted the filing of a false statement (Form I-130) and did so knowingly and willfully. Angelo Elusma is found Guilty on Count Nineteen of 86 Cr. 779.

* * *

The next marriage in point of time took place on November 29, 1984, between Michelle Griffin and Eval Alincar, who went to Darlington's office on the following day. This Count is charged in Indictment 86 Cr. 1017 as Count Four.

Michelle Griffin, a welfare recipient, married Eval Alincar for $1,000

to be paid at the marriage, and $1,000 additional after Alincar received his green card. This is the first count, chronologically which the Court has had occasion to discuss under the Clyde Day conspiracy, and we note early that the spouses were of a somewhat higher calibre than those in the Louissaint conspiracy, and earned more money.

Griffin had met Clyde Day through a mutual friend, who asked her whether she wanted to make some quick money, and when she asked how, Clyde Day said that she should "marry one of these aliens for a green card." Day, like Louissaint and Elusma, is a limousine/taxi driver. After assuring Griffin that she would not get in trouble, Clyde Day brought Eval Alincar to Griffin's residence at 124 East 117th Street in Manhattan, about

three days before the wedding. Clyde Day introduced Eval Alincar and made arrangements for them to go take the blood test. He also asked Griffin if she knew of three more girls willing to marry Haitians for money. After inquiry, Griffin was successful in obtaining Bonita MacIntosh to be a green card bride.

When Clyde Day came to pick up Griffin and Bonita MacIntosh on their wedding day, already present in the limousine were their bridegrooms, Eval Alincar and Leon Fanor, and one Louise Smith, who married Amaury Alcin, a Haitian, for money. Clyde Day drove the three brides and their Haitians to 116th Street and Lexington Avenue for blood tests, and then took them to the White Plains City Clerk's office to get marriage licenses. Griffin and Bonita MacIntosh were re-

jected as marriage licensees because of alterations they had made to their birth certificates, which were detected by the White Plains City Clerk. They later obtained proper birth certificates, and applied for marriage licenses in Manhattan. Clyde Day drove the six individuals to the Municipal Building in Manhattan for this purpose. The wedding was performed apparently in Mt. Vernon, according to GX 58, although Griffin testified that it was at "some church in White Plains" (Tr. 794). The certificate shows that the date of marriage was November 30th, although Griffin testified that Clyde Day had bribed the minister to perform the marriage on November 29,1984, prior to the time period permitted by the marriage license.

The three couples were married to-

gether, and according to Griffin, then drove to 50 Battle Avenue, in White Plains, where the men went into the house while the women remained in Day's limousine. The men returned, handed Clyde Day a white envelope from each husband, containing money. Clyde Day extracted $100 from each envelope, leaving each bride a $900 payment. The brides then went to a toy store in Yonkers, where they shopped.

The following day, Day picked up the certified marriage licenses and took the three couples to Darlington's office.

En route to Darlington's office, Day told the couples that he was going to this lawyer, because he knew him and had dealt with him before. Darlington conducted separate interviews of each couple with Day not present. Leon Fanon

and Bonita MacIntosh were interveiwed first, and Griffin and Eval Alincar last. Griffin testified that MacIntosh, a fugitive at the time of trial, never lived with Leon Fanor at the address, 50 Battle Avenue, shown on the I-130 form for the Fanor marriage (Count Nine of the Day Indictment), and since MacIntosh at the time lived in the same apartment building in Manhattan as Griffin did, she could establish that MacIntosh continued to live there.

Marie Alphonse was present at the interview, which Griffin and Eval Alincar had with Darlington.

Here, the testimony was as follows (Tr. 802):

"Q: Did he ask you where you were living?

A: Yes.

Q: What did you tell him?

A: We told him 50 Battle Avenue, and he told us not to use that address because it would look suspicious if we go to Immigration and all three of us were at the same address, so I gave him my address."

At this time Griffin also asked when she could have a divorce, and Darlington told her that she could have a divorce "seven months after you get the green card." (Tr. 804).

Notwithstanding this testimony, the Form I-130 as ultimately filed by Darlington, GX 59, did use the 50 Battle Avenue address. It was dated January 15, 1985, as having been executed by Michelle Alincar. However, the signature of Darlington is noted as "1/2/84." The Court

treats this as a typographical error intended to represent an entry for January, 1985. The form was received by INS on January 16, 1985.

Michelle Griffin, an admitted co-conspirator, testifying under an agreement with the Government, had a slight prior criminal record. Griffin admitted on cross-examination that prior to going to Darlington's office, Clyde Day had told her to tell Darlington that she lived with her husband (Tr. 814), and indeed she did so.

The Court notes that the forms filed contemporaneously with the meeting, are inconsistent with the testimony of the witness Griffin. If, as Griffin testified at trial, Darlington told her to use a false address because using 50 Battle Avenue (a rooming house in White Plains

well populated by Haitians) would be suspicious, it would be expected that the forms as submitted would contain the Manhattan address of Griffin, which she now testifies she agreed to sue when Darlington suggested suspicions whould be aroused. It does not.

The Court does not suggest that Griffin is a liar, or intentionally perjured herself as to this conversation, which she now says she had concerning the address to be used on the application. However, since the application contains an entry inconsistent with that which would have been expected to exist in light of the conversation testified to, and in light of the prior criminal record and possible bias of Griffin, the Court is not inclined to find scienter beyond a reasonable doubt as to Count

Four. Darlington is acquitted of Court Four of Indictment 86 Cr. 1017.

* * *

The testimony as to the Bonita MacIntosh, Leon Fanor marriage made on the same day and resulting in a visit to Darlington's office on the following day, simultaneously with the Griffin-Alincar client consultation, representing Count Nine of the second Indictment, rests essentially on Griffin's testimony, since MacIntosh was a fugitive at trial. Based on the same foregoing analysis as to Griffin's credibility, the Court finds a judgment of acquittal concerning Darlington on Count Nine of Indictment 86 Cr 1017.

* * *

The next matter for consideration chronologically is Count Three of the second Indictment, which involves a marriage which occurred December 14, 1984, followed by a visit to Darlington's office approximately one week later.

Sonya Alvarez, using the name of Leonia Anthony, married Raibert Vil, a Haitian on December 14, 1984. She knew Mr. Vil for four days prior to the marriage, and received $2,000 as a result of the efforts of Clyde Day. Day told Sonya Alvarez that "we would get married, the fellow would get his green card, and we would get a divorce in six months." (Tr. 749). He told her also that she did not have to live with her husband. Having borrowed a birth certificate from her friend, Leonia Anthony, Alvarez went with Clyde Day, Raibert Vil and his

sister-in-law to get blood tests. This was the first she had met Mr. Vil. After the blood tests, they went to the Municipal Building in Manhattan to get the marriage licenses, which show Alvarez's address to be that of Clyde Day's, 312 West 109th Street. Alvarez and Vil were married in Manhattan at a church through arrangements made by Clyde Day. The wedding was witnessed by Clyde Day, and the genuine Leonia Anthony, who signed as Denise Anderson. After the marriage, the parties took Raibert Vil back to the train station and got paid. The genuine Leonia Anthony and Alvarez divided $900 and Clyde Day received $100.

A few days later, but before Christmas, Clyde Day brought Alvarez to Darlington's office, where they were met by Raibert Vil. Day did not sit in during

the interview, but he did speak with Darlington before the meeting with the clients was held. Marie Alphonse was present.

Darlington asked Alvarez where she lived, and she told him "in Manhattan." This testimony was given at trial, with a several second pause between the question and the answer, a factor of witness demeanor which may be considered adversely in determining the credibility of Alvarez. (Tr. 757). At the same time, Mr. Vil told Darlington that he lived at 5 Gibson Avenue in White Plains. The witness did not remember what, if anything, Darlington had said when she and her Haitian-husband gave different addresses. However, Marie Alphonse had told her before the interview with Darlington that they had to go to Montreal,

and that they had to get one address. In response, the newlyweds gave her the White Plains address. Darlington was present reading papers while this was going on.

After the meeting, Alvarez asked Darlington when she could get a divorce, and he said that she could do so "when they get the green card."

The forms signed in blank, as finally prepared and filed by Darlington's office, show that the parties resided together at 5 Gibson Avenue, White Plains, New York. Alvarez testified that neither she nor the genuine Leonia Anthony ever lived with Mr. Vil at that address or any other.

The parties did go to Montreal for an immigration interview on April 1,1986, and had a preparatory interview with

Marie Alphonse, using a crib sheet and testing the applicants as to the effectiveness of their answers. Marie Alphonse told Alvarez and Vil that they had to come up with answers which "would be together", and Marie also told them that they should come up with addresses together, and mail some letters to the address, so that Alvarez would have proof that she lived with Vil. It does not appear, however, that Marie Alphonse undertook these proparations in the presence of or with knowledge of defendant Darlington, or at his direction. Ms. Alvarez was the sister of Derek Von Alvarez, who figures in Count Five of 86 Cr. 1017, infra.

The Court finds that as to this sham marriage, the Government has failed to prove scienter on the part of Dar-

lington beyond a reasonable doubt. The credibility of Alvarez is suspect, and there is insufficient evidence to show that Darlington is chargeable with knowledge of the activities of Marie Alphonse with regard to the Alvarez/Vil sham marriage. Darlington is acquitted as to Count Three of Indictment 86 Cr. 1017.

* * *

Coincidentally, on the same day as the Alvarez/Vil marriage, December 14, 1984, a marriage was made by Shawna Spady, using the name of Sonya Faulkner, with Russene Celestin, a Haitian. In this instance, Count Seventeen of Indictment 86 Cr. 779, the parties went to Darlington's office the same day as the marriage.

Shawna Spady, also a welfare recipient, knew Celestin for two weeks prior to the marriage, which was arranged by Sonya Faulkner. Faulkner told Spady that she was not expected to live with her husband, but that her services were sought to marry a Haitian for money so that he could get his green card. They then met Cureton (referred to by Spady in her testimony as Arlene Beverly), who introduced Spady to her bridegroom at a restaurant in New Rochelle. Cureton told Spady that she would get $500 and did not have to live with her husband. Spady thereafter went with Russene Celestin to the New Rochelle Hospital to get a blood test, and then to Mt. Vernon City Hall to get a marriage license.

The following day the marriage was performed at Mt. Vernon City Hall, wit-

nessed by Tyrone Barnum, who was Spady's boyfriend, and Cureton, signing as Beverly. Thereafter, they went by bus to Darlington's office in White Plains.

At the conference with Darlington, Marie Alphonse, Celestin, Cureton and Spady were present. Spady told Darlington that she and Celestin were living together at 127 Fisher Avenue in White Plains (Tr. 298). In doing so, she acted at the instructions of Celestin and Cureton. During the interview, most of the questions were answered by Cureton and Russene Celestin. Darlington had Spady practice her new married name, and sign the papers in blank. Spady, an illiterate, testified that she was incapable of reading GX 15, which showed 127 Fisher Avenue as being the matrimonial home. However, neither she, nor the real Sonya

Faulkner ever lived with Russene Celestin at 127 Fisher Avenue, or anywhere else. As submitted to INS, the document was dated December 27, 1984, rather than December 14th, when actually signed.

This couple was selected for a consular interview at Montreal, Canada, and visited Darlington's office prior to going to Montreal. There was a preparatory interview at the law office, going over the questions which would be asked. The parties were interviewed separately at Montreal, although Darlington was not present. Their answers did not coincide, and this resulted in a third visit to Darlington's law office. However, this time they did not speak to Darlington personally, because Darlington claimed he was too busy, and said that Celestin was wasting his time. Further discus-

sions took place with Marie Alphonse attempting to drill the couple as to how they should answer the questions on their return to Canada for a second interview.

On cross-examination Spady conceded twice that she had told Darlington that she was living with her husband at 127 Fisher Avenue in White Plains. (Tr. 312).

The nature and extent of Darlington's scienter on this Count must be measured by his understanding at the time that he filed the false statements with the INS. The Government has failed to prove beyond a reasonable doubt that when he did so, Darlington knew that the parties were not living together as they had represented to him that they were. Darlington is acquitted of Count Seventeen of 86 Cr. 779.

* * *

The third and last marriage of December 1984, Count Twenty of 86 Cr. 779, occurred on December 21st, and was followed by an interview with Darlington on the same day. This count also concerns defendant Angelo Elusma. Denise Oliver, using the name of Dale Frankle, married a Haitian, Heribert Pierrette. Ms. Oliver, also a welfare recipient, used the name of her friend, Dale Frankle, without Frankle's permission. She knew her husband Pierrette for three days prior to the marriage.

Ms. Oliver, who eventually joined the conspiracy as a marriage arranger, was recruited as a bride by Valli Duckett, who introduced her to Arlene Cureton. When Oliver went to meet Cureton, Angelo Elusma was present in the apartment. in a conversation in which Elusma

participated, Cureton told Elusma that Oliver wished to marry a Haitian for money, and Elusma asked Oliver whether she did want to do that, and she answered in the affirmative. (Tr. 195). She was informed during that conversation that she would need a birth certificate and that she would not have to live with her husband. Arlene Cureton also told her, in the presence of Elusma, that the purpose of having her get married to a Haitian was to make him a U.S. citizen. (Tr. 195).

Thereafter, Oliver went to the New Rochelle hospital alone, by bus, where she met with Angelo Elusma, Heribert Pierrette and Cureton. She had never met Pierrette prior to that time. Angelo Elusma helped her understand Pierrette, whose English was limited. After the

blood tests, Elusma drove them in his taxicab to City Hall in New Rochelle to obtain a marriage license, and on December 21st, Elusma drove Pierrette, Arlene Cureton and Oliver to the Mayor of Port Chester, where the marriage took place with Valli Duckett as one of the witnesses.

Immediately thereafter Elusma drove the couple to Darlington's office, accompanied by Cureton and Duckett.

En route to Darlington's office, Cureton told the newlyweds that they would have to sign some papers and say that they lived together, and that Oliver should remember how to say Pierrette's last name. Elusma was a participant in this conversation, but did not participate in the interview with Darlington.

Marie Alphonse was present in the law office during the interview and translated for Pierrette what Darlington was saying, although she testified that she has no independent recollection of the conversation. (Tr. 1035). According to Oliver, Darlington asked them whether they lived together, and Oliver told Darlington that they did. (Tr. 201). Following this conversation, Oliver quotes Darlington as having said (Tr. 201):

> "there was an article in the papers saying how people were getting married to Haitians for money and immigration was coming down on them because they were forged marriages and he said to me that he didn't care whether we were married for love or not or whether we was living together or not, he just wanted Heribert to have his papers straight when he went to Montreal."

Thereafter, Darlington asked the newlyweds to take pictures together, and told

Oliver that she would have to "remember everything that was in Heribert's apartment," and that he would have to get her name on the utility bills and bank accounts. (Tr. 201-202). Then Oliver asked Darlington when she could get a divorce from Heribert, and he responded that she could do so within six months after he got his green card. (Tr. 202).

Oliver signed the documents (GX 8 and 9) on December 21st, although as submitted to the INS, her signature on GX 8, the Form I-130, was dated January 21, 1985, and Darlington purportedly signed on January 22nd. The Form I-130 listed 131 First Avenue as the last address at which Oliver and her spouse resided. Neither Oliver nor Dale Frankle had ever lived with Pierrette at that address or anywhere else. After leaving

the law office, they went to Pierrette's house where he paid them $500, of which Cureton took $100, and the balance went to Oliver. There is no showing that Elusma received any money.

Oliver met again with Darlington, along with Heribert, to prepare for questions at a consular interview in Montreal. Darlington told her that she had to remember "what Heribert has in his apartment, curtains and things like that," in case she had to go to Montreal with Pierrette, because "Immigration was getting stricter." (Tr. 207). Heribert did receive his green card, and thereafter Oliver returned to the law office and spoke with Darlington's secretary, Marie Alphonse, to ask whether she could get a divorce. Alphonse told Oliver that "I shouldn't try to get a divorce right

then and there because Immigration would get suspicious." (Tr. 210). There is no indication that Darlington knew of this discussion.

While Darlington's December 21st remarks as quoted by Oliver are both inexplicable and unnecessary, in light of Oliver's immediately preceding statement to him that the couple did live together, the Court finds a failure of proof of scienter as of that date, as which point it must be tested. Darlington is acquitted of Count Twenty of 86 Cr. 779.

As to Angelo Elusma, the Court finds beyond a reasonable doubt that he knowingly and willfully participated in the effort to effectuate a sham marriage between Oliver and Pierrette in order to obtain immigration benefits for Pierrette, and Elusma is found Guilty on

Count Twenty of 86 Cr. 779.

* * *

The marriage of Derek Von Alvarez to Martine Gelin on February 23, 1985, followed by a visit to Darlington's law office on the same day, Count Five of 86 Cr. 1017, involved a female Haitian and an American citizen who was not on welfare. Von Alvarez, a 21 year old cashier in a family grocery in Manhattan, had completed 10 years of schooling. Here the same pattern was followed as in other cases. Day asked Von Alvarez if he wanted to marry a Haitian woman for some money so she could get a green card, Von Alvarez agreed to do so, and went to get a blood test. Thereafter, on the occasion of the couple's first meeting, Day

drove them to the Municipal Building in Manhattan to get a marriage license. Day told Von Alvarez that they would not have to live together. The wedding took place on February 23rd at a church in Manhattan, witnessed by Clyde Day. Gelin paid $1000 for the marriage; Day took $100 as his share, and paid $900 to Von Alvarez. Following the ceremony, Day drove the couple to Darlington's law office.

Gelin and Von Alvarez were interviewed jointly by Darlington after Day had spoken privately with Darlington. According to Von Alvarez's testimony, when Von Alvarez gave Darlington his Manhattan address, Darlington said it would look bad if the couple lived in two separate places. Thereafter, Darlington prepared and filled GX 70, which stated that the Von Alvarez couple had resided

together at 264 South Lexington Avenue in White Plains since February, 1985. Von Alvarez never did so.

Form G-28 for Von Alvarez was post-dated to September 27, 1985, and signed with a rubber stamped signature of Darlington. As noted earlier, it turned out that on September 27, 1985, Von Alvarez was doing time at the New York City Penitentiary on Riker's Island for assault.

On cross-examination, Von Alvarez admitted that he had informed Government agents during the pre-Indictment phase of the case that he had told Mr. Darlington that he was planning on moving up to White Plains. Von Alvarez admitted that he had lied to Darlington (Tr. 744). Accordingly, the Court cannot find proof beyond a reasonable doubt of scienter on

the part of Darlington on this particular Count, and he must be and hereby is, acquitted of Count Five of 86 Cr. 1017.

* * *

The next sham marriage charged in this trial, Count Two of 86 Cr. 779, occurred on May 29, 1985, between Theresia Rufus and Thelemarque Thelusma. The couple visited Darlington's office on the same day. Patricia Parris, a cousin of the bride, along with Denise Oliver, recruited Ms. Rufus by telling her that she would receive $500 for marrying a Haitian so that he could get his green card. While they did not actually tell her that she would not be expected to live with her husband after they got married, she understood or inferred

that she was not required to do so.

Ms. Rufus first met her husband at the hospital in New Rochelle where they went together to get a blood test. Patricia Parris drove her there, and Denise Oliver accompanied them. At the hospital they met Jean Louissaint, who was there with the groom. The next day they obtained their marriage license in New Rochelle, accompanied by Parris, Oliver and Louissaint. On the following day they were married in the New Rochelle Courthouse. The marriage certificate was witnessed by Parris and Louissaint.

Although she was unable to identify Darlington at trial, Rufus attended the attorney's office in White Plains with her husband, Louissaint, Oliver and Parris. Rufus recalled that she told the attorney, whom the Court finds to be Dar-

lington, that she was residing at 131 Ferris Avenue in White Plains. This was false. However, there is no evidence that Darlington was so informed. Here again, the application form was signed in blank and postdated. The Court finds no evidence of scienter by Darlington insofar as concerns this marriage. Indeed Rufus testified that it did not appear to her that Darlington knew anything was going on. (Tr. 388). Darlington is acquitted of Count Two of Indictment 86 Cr 779.

* * *

The next sham marriage occurred on July 26, 1985, between Toni Renita Jones and Philome Stervil. This couple, Count Four in 86 Cr. 779, did not go to Dar-

lington's office until two weeks after the marriage. Ms. Jones, who actually had a job, married Stervil for money, so that he could become a legal alien. She was asked by Denise Oliver to do so, and told by Oliver that she would get paid $500 for the marriage, that the marriage would only last for six months, and that she would get $500 more after the divorce. (Tr. 350). Patricia Parris also participated in the arrangements. They told Jones that she did not have to live with her husband.

Unlike the other sham marriages, Jones, when she first met Stervil "explained to him that, you know, this is just to help you out and that there would be no sexual activity or nothing like that because I had a boyfriend of my own." (Tr. 351). They then obtained

blood tests at New Rochelle, and a marriage license from the City of New Rochelle. The marriage was performed at New Rochelle City Hall the following day, and witnessed by Parris and Oliver. About two weeks later she met with Darlington for the first time for about 15 minutes. She later returned to bring a properly certified birth certificate.

Jones testified that in her interview with Darlington she told him that she lived at 124 West First Street in Mt. Vernon, and Stervil told Darlington that he lived at 668 Dobbs Ferry Road, an address known to be in White Plains. According to Jones' trial testimony, Darlington said nothing after separate addresses were given. 9Tr. 356-57). As finally submitted, the immigration documents show the Dobbs Ferry Road address

as the marital domicile. However, Jones testified on cross-examination that GX 25, the Form I-130, was filled out when she signed it. (Tr. 365). And she further conceded that her husband had told Darlington in her presence that they were living together. (Tr. 370). In light of the inconsistent testimony on cross-examination and want of credibility, the Court cannot find guilt proved beyond a reasonable doubt as to the Stervil marriage and Darlington is acquitted of Count Four of 86 Cr. 779.

* * *

The next wedding occurred August 6, 1985 between Charlotte Allen and Ermilus Presume, followed by a visit on the same day to Darlington's law office. This

marriage is the basis for Count Three in 86 Cr. 779, and was arranged by Parris and Oliver.

Allen, another welfare recipient, knew Presume about a week before she married him, and received $500. She was recruited into the conspiracy by Toni Jones, see supra, who in turn introduced her to Patricia Parris. She first met her husband on the occasion of going to New Rochelle from White Plains for the blood test. The marriage license was applied for in New Rochelle, and the wedding was performed there the following day, August 6, 1985.

On the way to Darlington's office, Parris told Allen to tell Darlington that she and her husband were going to live together. Upon being asked by Darlington, they did so. Darlington made the

gratuitous remark that "I hope this marriage is for real, because you look like a nice looking couple." Darlington filed the Form I-130, listing the address of the newlyweds as 137 Ferris Avenue, White Plains.

The proof as to the Presume marriage does not rise to the level which would permit a finding beyond a reasonable doubt that Darlingotn knew that the document being filed was false, and the marriage sham. Darlington is acquitted of Count Three of 86 Cr. 779.

* * *

The next marriage chronologically was made September 12, 1985, between Sherry Butler and Marcel Luctama. The marriage was followed by a trip on the

same day to Darlington's office, and was arranged by Parris and Oliver. It represents Count Five of Indictment 86 Cr. 779. Sherry Butler, while waiting to testify in the witness room, participated in ripping off two of the jurors. A reasonable juror would disbelieve Ms. Butler based on the entire trial record as well as the larceny. Were she to be believed, her testimony would not be sufficient for a finding of guilt beyond a reasonable doubt as to Count Five of 86 Cr. 779. (Tr. 442). Darlington is acquitted of that Count.

* * *

Next in point of time was the marriage of Deborah Hayes to Dupera Luctamar, which took place on September 12,

1985, and resulted in a visit to Darlington's office on the same day. This is Count Six in Indictment 86 Cr. 1017.

Ms. Hayes, also a welfare recipient, married Luctamar for $1,000 after knowing him for two days. The idea of "marrying a Haitian for money" was suggested to her by her girlfriend Michelle Griffin. (Tr. 667). Griffin introduced her to Clyde Day, who told her that she would receive $1,000 for getting married, and that when she was divorced she would get another $1,000. Day told her she did not have to live with her husband after marriage. Hayes, Michelle Griffin, Dupera Luctamar and Luctamar's brother went to the marriage bureau in the Municipal Building in Manhattan in Clyde Day's limousine to get their marriage license. This was the first occasion Hayes had met Lucta-

mar, who spoke no English.

Ms. Hayes was married in the Clerk's Office in the Bronx, and went directly to Darlington's office, along with her husband, Griffin, Day and Luctamar's brother. She gave Darlington the address of 137 Fisher Avenue in White Plains. Although this bride and groom shared no common language, there is no evidence that anything occurred in Darlington's office on the one occasion when the couple were there, which would alert him to the fact that this was a sham marriage. Darlington is acquitted of Count 6 of 86 Cr. 1017.

* * *

On October 1, 1985, Crystal Ann Hall married Ernest Fleurimond, and they jour-

neyed on the same day to Darlington's law office. This marriage is the basis for Count Seven of 86 Cr. 1017.

Hall, a welfare recipient, married Fleurimond through Clyde Day for $1,000. Day told her that she "would get married and never see the guy again." (Tr. 640). Day explained to Hall that she was not expected to live with her husband. Clyde Day took Fleurimond, his cousin Raroul Petit Homme (see Count Eight, infra), together with Ms. Hall in his limousine to the Bronx branch of the City Clerk's Office to obtain a marriage license. Day remained in the automobile because he had brought too many people there before and did not wish to be recognized. The couple were married the following day, with the marriage witnessed by Raroul Petit Homme. Again,

Day stayed in the automobile because he was too familiar with the persons officiating. After the wedding and having had lunch, the couple went to Darlington's law office, with Petit Homme and Clyde Day.

En route to Darlington's office Day instructed Hall "not to speak to [her husband] or give him [her] address or telephone number," and "to be calm when [she] went up to sign the papers." (Tr. 667). As noted earlier in our discussion of Count One, Day also told Hall that he would get a cut from Darlington's fee.

According to Ms. Hall, an inexplicable conversation occurred between herself and Darlington, in which Darlington asked Hall whether Clyde Day was known for fixing up marriages, and did she

know that Clyde had brought people to his office. Hall denied such knowledge. Darlington did not ask Hall where she was living, but he did suggest that she put some clothes in Ernest's house, so that if in six months an investigator was to come up there, they would "know we were living together." (Tr. 648). Darlington filed a postdated application for the Fleurimond marriage and used the 135 Fisher Avenue address as the marital domicile.

The Court finds the remarks attributed to Darlington about "fixing up marriages" incredible in their context. Absent evidence that Hall told Darlington she did not live with her husband, there is a failure of proof that anything occurred in Darlington's office to alert him to the fact that the Fleurimond mar-

riage was sham, and Darlington is acquitted of Count Seven of 86 Cr. 1017.

* * *

On October 22, 1985, Sandra Miller married Delima Luc Philus, and they went to Darlington's office a few days later. This charge comprises Count Nine in 86 Cr. 779. Darlington had a prior acquaintance with the Haitian husband in this case, having handled Philus's unsuccessful attempt at labor certification and his divorce from another undocumented Haitian, Janise Accius.

Denise Oliver and Patricia Parris arranged for the introduction of Philus to marry Sandra Miller, a welfare recipient, for money. She met him in New Rochelle, having been driven there by

Oliver. Oliver and Parris told her that she did not have to live with her husband, who was entering the marriage so that he could stay in the country. During the marriage ceremony in New Rochelle, the groom's brother interpreted for him, as Philus was unable to speak English. At the law office, Sandra Miller was interviewed separately from her husband and she stated that she lived at 114 Ferris Avenue, her husband's address. She signed the usual papers in blank, which Darlington's office later filled out and dated December 26, 1985. She was at Darlington's office only once, and apparently the interview was conducted by Marie Alphonse, not Darlington who, according to Miller, met with the couple for only two minutes. (Tr. 429). Miller conceded on cross-examination that she told the

lawyer that she and her husband were living together.

There is insufficient evidence of scienter on the part of Darlington in connection with this marriage, and he is acquitted of Count Nine of 86 Cr. 779. However, the circumstnaces of this interview and of Darlington's prior dealings with Delima Luc Philus and his first wife, Janise Accius, bear on Darlington's knowledge regarding a sham marriage between Accius and Andrew Parris, see infra.

* * *

Two days later Sabrina Collins married Filusma Filus, and they visited the law office of Darlington the same day. This sham marriage was arranged by Pa-

tricia Parris and constitutes Count Eleven of 86 Cr. 779.

Sherry Butler had introduced Sabrina Collins to Patricia Parris, who arranged the marriage for money. Parris told Collins that she did not have to live with her husband. The marriage license was obtained in New Rochelle on October 18th and the couple were married on October 24, 1985. Following the wedding, they went directly to Darlingotn's office. Sabrina Collins testified that Darlington asked her whether she was living with Philus, and that she answered in the negative, giving 32 Sycamore Avenue, her mother's address as the place where she was living. Filus was asked where he was living, and he gave the address of 264 Lexington Avenue in White Plains. Collins testified as follows (Tr. 467):

"Q: What if anything, did Mr. Darlington say when you told him that you were not living with your husband?

A: He said that I shouldn't say that, and that I should be living with my husband or I should go into the house and remember things like telephone, the color of the bedroom, and that was it. And he showed me items of a magazine saying that I can get in trouble, not Filus. [He] showed me an article of people that had done this before.

Q: He said you should either live with your husband or at least know what was in his apartment?

A: Right, the color of the phone, the bath, the bedroom.

Q: Did Mr. Darlington ask you whether you intended to live with your hus-

band, or were you going to live with him?

A: He said I should live with Filus or I should go to the house and remember different items in the house."

(See also, Tr. 402).

The Form I-130 as filed represented the couple as residing at 264 Lexington Avenue, White Plains, New York. The application was postdated to December 26, 1985. Sabrina Collins received her money and went her way.

However, Sabrina Collins did file a joint tax return with her husband in 1986 and gave conflicting testimony to the grand jury. While Ms. Collins, who was not on welfare, gave a logical explanation of her conflicting grand jury testimony, the Court notes that Darling-

ton apparently never reviewed or signed the Form I-130 in this case (GX 29), which nonetheless was filed with the INS. Marie Alphonse's testimony is uncontroverted that this document fell through one of the many administrative cracks afflicting Darlington's law office. (Tr. 1066). Thus, there is a failure of proof that Darlington was sufficiently familiar with the circumstances of the Filus application to be alerted that it was false and the marriage was a sham. Darlington is acquitted of Count 11 of 86 Cr. 779.

* * *

On October 26, 1985, Andrew Parris, a brother-in-law of Patricia Parris, married Janise Accius, and they went to Dar-

lington's office a few days later. This marriage, arranged by Patricia Parris and Denise Oliver, represents Count Six in 86 Cr. 779. Andrew Parris, age 24, was living with his mother at the time of the trial. His mother was supporting him. Janise Accius, the Haitian spouse, was known earlier to Darlingotn, who had obtained a divorce on September 27, 1985 for her, from Delima Luc Philus, see supra.

We note that Janise Accius and Delima Luc Philus had earlier retained Darlington to try to obtain labor certification for Mr. Philus as a means of allowing him to remain in this country legally. Darlington testified that the progress of this certification was slow. (Tr. 1213). Abandoning this avenue of immigration opportunity, Philus and

Accius thereafter obtained a divorce through Darlingotn. One month after that divorce, Philus turned up at Darlington's office with an American spouse, Sandra Miller, and an I-130 petition was filed on his behalf for adjustment of status based on that marriage. No suspicions were aroused at that time, and, in fact, Darlington spent only two minutes with the newlyweds who were interviewed by Marie Alphonse. However, only three days after the Philus-Miller interview, Janise Accius appeared at Darlington's office, also with a new American spouse, Andrew Parris.

Andrew Parris met his wife Janise Accius the first time when they went together to Mt. Vernon to obtain a marriage license. Ms. Accius spoke no English, and a friend interpreted for them.

The parties were married at Mt. Vernon, New York, and went directly to Darlington's office. Parris testified that he was unable to communicate directly with his wife during the interview with Darlington. (Tr. 398-99). No adverse inference may be founded solely on the language barrier. The language of love is universal as the late General Patton found out when he ordered the GI's not to fraternize with the frauleins.

Parris also testified that Darlington told him "some people think these marriages are fake. I don't want to know, I'm not going to check up on you." (Tr. 399, see also Tr. 402). And it was Marie Alphonse's testimony that, although she was "not really" suspicious of Delima Luc Philus's remarraige, "when [Philus's] wife [meaning Accius] came in, I became a

little suspicious of her marriage." (Tr. 1053). Her suspicions were heightened by the fact that even after their respective remarriages, Mr. Philus and Ms. Accius still used the same home telephone number, as recorded on their respective I-130 petitions. (Tr. 1056-58).

Parris testified that he signed the usual papers in blank and left. The papers as filed indicated a marital residence at 81 Ferris Avenue, White Plains, New York, but Parris had never lived there at that address, and had never told Darlington that he did. The document was postdated to November 20, 1985.

Andrew Parris is a convicted felon with a very serious criminal record who had been immunized for his part in the scam. However, his testimony is consistent with the testimony of Darlington and

Marie Alphonse as to the Philus-Accius divorce and both Haitian's subsequent remarriage to American citizens one month thereafter. Although Darlington cannot be charged with the suspicions harbored by his employee Marie Alphonse, his statements to Andrew Parris, the American bridegroom, during the interview with Parris and Accius, and his knowledge of Accius' earlier marriage to the Haitian Delima Luc Philus, of Philus' attempt at labor certification, of their divorce, and of Philus' remarriage, support the inference that Darlington deliberately closed his eyes to the truth. The evidence at trial established beyond a reasonable doubt that Darlington was aware of a high probability that the Parris marriage was sham, did not actually believe it to be genuine, yet consciously

avoided learning the truth. Darlington is Guilty of Count Six of 86 Cr. 779.

* * *

The next marriage in this case was made by Lisa Beechum, with Inorable Alincar, on December 3, 1985. This marriage, which is Count Ten in 86 Cr. 779, was arranged by Patricia Parris and the couple found their way to Darlington's office on the same day.

Lisa Beechum, a welfare recipient, knew her husband one day prior to the marriage, and agreed to Parris' arrangements as a result of the intermediary activities of Sherry Butler. With her friends, Barbara White, Patricia Parris, and Denise Oliver, Ms. Beechum went to 114 Ferris Avenue in White Plains from

her home in Mt. Vernon. They met two Haitians, and Patricia Parris told Ms. White and Lisa Beechum to "pick a husband." (Tr. 491). Barbara made a pick and this left for Lisa Beechum the remaining Haitian applicant.

The marriage license was applied for in Mt. Vernon, and the parties went to New Rochelle to be married the next day.

Darlington, together with Marie Alphonse, interviewed Barbara White and her Haitian husband at the same time that they interviewed Beechum and Alincar. Ms. Alphonse acted as interpreter for the Haitians and she testified at trial that she has no specific recollection of the conversation. (Tr. 1063). Ms. Beechum told Darlington that she would be living at 248 South 3rd Avenue, Mt. Vernon, and the husband gave his address as 114 Fer-

ris Avenue, White Plains (Tr. 495-496). Darlington said nothing, but showed them a news or magazine article about a fraudulent marriage. (GX 32). Ms. Beechum signed the Form I-130 in blank, and it was later filed showing 114 Ferris Avenue, White Plains, New York, as the place of residence. She had never told Darlington that she lived at that address, and indeed had told him that she lived at 248 South 3rd Avenue in Mt. Vernon. The application was postdated to December 18, 1985.

While Barbara White and her husband, whose marriage is not a part of these Indictments, were paying Mr. Darlington, Barbara asked in front of Darlington "where is my money" and Beechum undertook to kick her in Darlington's presence. (Tr. 502). An inference can be

drawn that Darlington observed this happen.

While the usual difficulties which inure in the credibility of all of the prosecution witnesses are present with Ms. Beechum, this Court observed her and believes that she was essentially a credible and truthful witness, whose memory of the event is accurate. The Court notes that Beechum testified to the grand jury that she had been told by Parris and Oliver in effect to make sure she gave the same address as her husband gave. This evidence is highly relevant on the conspiracy count, but does not affect the substantive count for filing a false document. The evidence establishes beyond a reasonable doubt that notwithstanding the instructions given Beechum by the marriage arrangers, when she actu-

ally was interviewed by Darlington, she and her Haitian spouse gave different addresses and Darlington falsified this information on the documents filed with the INS. The Government has satisfied its burden of proof as to Darlington's scienter and he is Guilty of Count Ten of 86 Cr. 779.

* * *

The last marriage in point of time was made on January 7, 1986 by Levitha DeSouza with Raroul Petit Homme and is Count Eight in Indictment 86 Cr. 1017.

Ms. DeSouza, also a welfare recipient, lived in Manhattan. She was recruited to marry Raroul Petit Homme by Clyde Day and Michelle Griffin. She met her husband a day before the marriage,

and was offered $600. Although Clyde Day produced the husband, Ms. DeSouza never actually met Day, but learned of his efforts through Ms. Griffin. Griffin told DeSouza that she did not have to live with her husband.

She met her husband-to-be at the Metro-North Railroad Station at 125th Street and Park Avenue, and together they went to the Municipal Building in Manhattan to obtain a marriage license. The marriage was performed at the Office of the City Clerk on January 7, 1986.

Ms. DeSouza visited Darlington's office about two weeks later with her husband. When Darlington asked where they lived, she gave her address at 127 East 117th Street, Manhattan. Mr. Homme told Darlington that he lived at 137 Fisher Avenue in White Plains. DeSouza

testified as follows (Tr. 703).

"Q: What did he say when you and your husband gave him different addresses?

A: When we gave him different addresses he said we had to make it look like we were -- look like we were living together . . .

Q: Did he say why?

A: He said for the purposes of immigration, of course.

Q: What did you do when Mr. Darlington told you that you had to make it look like you were living together?

A: Well, I told him that I was not going to live with him, with Raroul."

Ms. DeSouza says that she signed the Form I-130 after it was filled out indicating a matrimonial domicile of 137 Fisher Avenue in White Plains, New York. While

this Court does not believe that Darlington personally typed the instrument, as DeSouza testified, this difference is not significantly derogatory of DeSouza's truthfulness. That Darlington personally conducted the intake interview is corroborated by the testimony of Marie Alphonse. (Tr. 1059).

There was some issue at trial whether or not Ms. DeSouza specifically told Darlington that she and Petit Homme were not going to live together. Her statements on this subject, made during an interview with Government agents on October 16, 1986, were to the effect that she "thinks she told lawyer [sic] they weren't going to live together, but not sure." (GX 86). She claims her memory improved by the time of the trial but gave no explanation as to why. (Tr. 719).

However, the Court believes her testimony that she and Petit Homme gave Darlington different addresses at the interview, testimony which is corroboroated by DX GG.

This defense exhibit, a single sheet of lined yellow paper, contains Darlington's notes of the intake interview with DeSouza and Petit Homee, and was identified at trial by both Darlington (Tr. 1245), and Marie Alphonse (Tr. 1060). Various portions of the notes are crossed out, but still legible. As Marie Alphonse testified, one portion "is completely crossed out so that you can't read it," and this portion "is in the address section under the words address [sic]." (Tr. 1060). As Darlington conceded, the notes contain "only one thing that's been obliterated so you can't

read it," which is adjacent to where Darlington recorded Petit Homme's address. (Tr. 1246). Darlington could not recall what was in the address section that was obliterated. The Court infers that it was Ms. DeSouza's address and that Darlington therefore was aware at the time he filed the immigration documents that the newlyweds lived apart. Nevertheless, the documents as filed reflect a single marital residence. The Government has proved beyond a reasonable doubt that Darlington knowingly submitted a false document to the INS and he is Guilty of Count Eight of 86 CR. 1017.

* * *

The foregoing constitutes the findings of fact and conclusions of law of

the Court. A full presentence investigation is directed with respect to each defendant, and defendants and their counsel shall report to the United States Probation Officer at White Plains, during business hours on or before June 5, 1987. They shall attend before the Court for purposes of imposition of sentence on July 21, 1987, at 9:00 a.m.

So Ordered.

Dated: White Plains, New York
June 2, 1987

Charles L. Brieant
Chief Judge

JUDGMENT AND SENTENCE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v. 86 Cr. 779 (CLB)

CHARLES DARLINGTON,

ANGELO ELUSMA,

Defendants.

----------x

December 3, 1987
9:40 a.m.

Before:

HON. CHARLES L. BRIEANT,

District Judge

APPEARANCES

RUDOLPH W. GIULIANI,

United States Attorney for the

Southern District of New York,

AVRAHAM MOSKOWITZ,
Assistant United States Attorney

JANET CUNARD,

P.P.M. BARDUNIAS,

Attorney for defendant Darlington

HARRY POLLACK,

Attorney for defendant Elusma

(In open court)

THE COURT: Good morning.

(Case called)

MR. MOSKOWITZ: The government is ready, your Honor.

MS. CUNARD: The defendant Darlington is ready and has an application, your Honor.

THE COURT: All right. Ms. Cunard, your application may be heard.

MS. CUNARD: Your Honor, we would ask for another brief adjournment of the same nature as we have previously requested. We received the financial documents or a copy of them last night shortly after 6 o'clock and we have gone through them and tried to put them in order, but needless to say we haven't been able to do anything with them and we would like an opportunity to do something with them.

Mr. Darlington has been in contact with people who earlier expressed interest and they are still interested and they want to see those documents.

THE COURT: What is it that the documents are needed for?

MS. CUNARD: The financial records of his business.

THE COURT: It wasn't a business, it was the practice of law?

MS. CUNARD: The practice of law, your Honor.

THE COURT: What are they needed for?

MS. CUNARD: They want to see --

THE COURT: Who is the "they"?

MS. CUNARD: A law firm in the city wants to see if it would be practical for them to expand their business to White Plains to take over Mr. Darlington's practice and take over the practice

in White Plains and have a branch office up there.

THE COURT: By that you mean they are going to take over the lease?

MS. CUNARD: Yes, your Honor.

THE COURT: How long does the lease have to run?

MS. CUNARD: Four more years, your Honor.

THE COURT: I thought that we had an understanding about the scheduling here. Your last continuance was granted over some objection by the governemnt. It also affects the case of Mr. Pollack's client because if his case goes forward and yours doesn't, you will be visited with a scheduling order from the Court of Appeals.

MS. CUNARD: We would be prepared to follow that scheduling order from the

Court of Appeals. Even though it would cut down on our time, we would have no problem with that.

THE COURT: You might have a problem.

Mr. Moskowitz.

MR. MOSKOWITZ: You Honor, the government does object to any further adjournment. The government has been ready since the conviction was entered in this case way back in June.

Mr. Darlington through his counsel has taken every opportunity to adjourn for whatever purpose, for whatever reason. As I indicated last time when we were before your Honor, to the extent that if Mr. Darlington is going to be incarcerated for any period of time and there is a question of closing a deal of any sort, there can be a surrender date that is put into effect which would

not disturb any business deal that might be in the offing.

The government offered to make those documents available the day that we were before your Honor last time or, in fact, the time before that when the adjournment was sought. Ms. Cunard, instead of calling the court when there was a problem suggesting another conference, sought to go by motion, extending the time another two weeks. I believe, your Honor, that the defendant in this case has dragged this out long enough and it is time that justice be served.

THE COURT: You know, this is a disagreeable and unpleasant matter for everybody and I really don't see this as being a bona fide reason for a further contested adjournment. If there were agreement on the matter, I prob-

ably wouldn't mind it, but it seems to me that nothing is to be gained. If they decide to take over the lease and the fixtures, they will and do it fairly soon and, if they don't, they won't.

I don't think that -- since they know that this matter is in the offing in any event, otherwise there would be nothing that anyone would be trying to sell-- I don't think this transaction is really affected one way or the other. I think the court has gone about as far as it ought to absent agreement so, unless there is something further, I think I will conclude to go forward today.

Is there anything else on this point?

MS. CUNARD: Your Honor, the problem is that there is nobody to handle the cases of the clients that are pending in

the office and this is something that was sought, continuity and having another attorney to come in.

THE COURT: That can be arranged without regard -- in the first place, I am not at all certain that the appellate division at this time of year is going to act immediately on anything, but --

MS. CUNARD: The suspension is automatic by the way, your Honor.

THE COURT: This is not a state court felony. This is a federal conviction. Since that famous lawyer punched the revenue agent, I tried to tell you this last time, they don't result in automatic disbarment in the state court anymore.

MS. CUNARD: If it were a state felony conviction, it would be automatic disbarment from the state court, but here it is an automatic suspension in the

state court.

THE COURT: I still believe in the absence of some kind of agreement I can't see any purpose in extending it any further.

How many clients are we talking about?

MS. CUNARD: About 1,800 clients, your Honor.

THE COURT: Now pending?

MS. CUNARD: Yes, your Honor.

THE COURT: That is more than he had at the time of trial?

MS. CUNARD: It is not, your Honor. It was about that number open and about that number closed and it is still about the same number.

THE COURT: I think the court on balance and having agreed with you last time that this was to be the date on which

nothing further was to be sought by way of further continuance that the court should and does hereby deny the application and at this time, Ms. Cunard, you may be heard in your client's behalf on the mitigation of sentence.

MS. CUNARD: Your Honor, I first ask to hand up some letters.

THE COURT: More letters?

MS. CUNARD: Yes, your Honor. Some were sent to your Honor and some I received.

THE COURT: Why weren't the letters here earlier?

MS. CUNARD: Your Honor, unfortunately, --

THE COURT: Have you got copies of them for the prosecutor?

MS. CUNARD: No, I don't have, your Honor. I do have a copy to refer to and

I will make a copy for the prosecutor and --

THE COURT: You hand them up right now. I think we are being victimized by some dilatory conduct here.

MS. CUNARD: Your Honor, I apologize. These letters were lost in my office. We searched Mr. Darlington's office and my office last night until about 10:30 looking for the letters. We couldn't find them. We finally found them in my office and they were mixed in with papers from another file. I apologize. It is my fault.

I will show a copy of the letters to Mr. Moskowitz so he may read them now and I will provide a copy to him later.

(Pause)

THE COURT: All right. The court has read the letters. The letters confirm

generally what is said about the defendant Darlington in the presentence report and as this court observed as a result of having presided at the trial.

Several of the letters attest to his fine character, reputation in the community, efforts in behalf of others, and aver with some strength that he is innocent.

In making its findings and conclusions the court stretched the presumption of innocence about as far as the law allows and I am just disregarding and discrediting the statements in these letters to the effect that he is innocent because, as far as I am concerned at least on counts as to which he remains convicted, he is guilty beyond a reasonable doubt and these people who wrote the letters didn't hear the testimony.

You may proceed, Ms. Cunard. Has your client read the presentence report?

MS. CUNARD: Yes, your Honor, he has.

As to the presentence report, your Honor, we would note that there are minor discrepancies in it but it includes the Levitha de Souza account as a conviction.

THE COURT: This court acquitted him on that count after the report was prepared.

MS. CUNARD: Yes, your Honor, I would just note that.

Your Honor, Mr. Darlington has been a practicing attorney for about 20 years and the people who know him best know him in his practice have all indicated that he is well-known in that legal community for his honesty and character.

There were three of the judges before whom he practices who came into

trial and attested to his character as being beyond reproach.

The Administrative Judge of the Ninth Judicial District but including the County of Westchester, who should best know, said his reputation for truth and veracity was excellent. To use his word, excellent.

This man testified at the trial. He had a lady in his office who worked on these cases who testified as to her perceptions.

For the government there were three witnesses, two of whom, as the court has noted, have horrendous criminal records. The other of whom is the standard welfare recipient who shows no inclination to make anything better of herself and this court in its decision noted the difficulties which inure in the credibility

of not only her but all of the prosecution witnesses.

The government forthrightly admitted they did not even interview or attempt to interview the other parties to these marriages. There was no evidence other than what these persons had to say --

THE COURT: Are you making a Rule 29 motion?

MS. CUNARD: No, your Honor, I am not.

THE COURT: Talk about sentence. Nothing would give me greater pleasure than to find your client not guilty in this case. I made what I regard as a conscientious decision. I have issued my findings of fact and conclusions of law. I know you don't agree with me.

You have a right, if we ever get to the point of entering final judgment

here, to have that reviewed on appeal, but to talk now about the credibility of the witnesses is outside the point.

MS. CUNARD: Your Honor, it is my understanding that I am permitted to do that, but if the ruling is contrary I will abandon that line.

I will point out that Mr. Darlington has an excellent reputation in his communities. The communities, plural, in which he lives and works.

He is not a man to knowingly do something in violation of the law. Your Honor has found that he did. This is totally out of character for him and if it was done, and he has searched his files and he believes that he was fooled by these people, he believes that the allegations that the marriages were bad are true, but that is based upon what he has

found out since. He did not at the time.

Your Honor, the conviction in this case is more than enough punishment for him without additional punishment. As a matter of law he will lose his license to practice law. He will lose the means of earning a living that he has employed throughout his adult life.

He and his family will suffer and, your Honor, that is enough punishment for a good man. We ask you to impose the most lenient sentence possible.

Thank you.

THE COURT: Mr. Darlington, you have the right to be heard in your own behalf and present any information in mitigation of sentence.

DEFENDANT DARLINGTON: Just a few words, your Honor, if I may. I respectfully disagree with your Honor's find-

ings. I believe I am innocent of these charges.

THE COURT: I understand that.

DEFENDANT DARLINGTON: I just would like to reiterate my attorney's statements that at the time these people were in my office I did not at any time know that these marriages were not bona fide. Subsequent to the trial, my attorneys and I have in fact examined every single file with a fine tooth comb and every case which had the slightest indication that it was not a bona fide case we have not pursued and we have given the files back.

This was a very unfortunate situation that happened to me and my family. I am going to lose my practice. I will be without a living and I do also request that the court be lenient to me and my family and exercise whatever compassion

you can exercise in my family's behalf.

THE COURT: All right, sir.

Mr. Pollack, you may be heard in behalf of Mr. Elusma and present any information in mitigation of sentence.

MR. POLLACK: Thank you, your Honor.

Your Honor, Mr. Elusma stands in a different posture here than Mr. Darlington in the sense that he was charged with actually participating in the arrangement of two marriages which were, according to testimony by the U.S. citizen spouses, not genuine.

In each case, and it is undisputed and I am sure if there were any doubt of that the government would have pointed it out quickly, in each case it was a relative. There has been no evidence whatsoever that they profited from this.

Unfortunately, if indeed he did do

it, and the court found, the jury did not agree on whether the proof had been sufficient, but the court found him guilty of these two substantive counts as well as conspiracy and, of course, I will not fall into the error that the court pointed out before by saying that I am going to relitigate at the time of sentence the question of guilt or innocence. The court found him guilty. He is guilty unless and until an appellate court finds otherwise.

About character here, we did have one character witness in Mr. Elusma's behalf, but I have known Mr. Elusma myself for a good number of years and I have read the probation report, as he has, and while the job information is not up-to-date as of this time because it was taken some time ago, this is the hardest

working man I know, Judge.

He works two jobs. He works some 16 hours a day. He works for the hotel up there in White Plains, the Crown Plaza, and he works nights in a restaurant and he is doing this to support a daughter from his first marriage and he is in the process of applying to bring his new wife to the United States.

The probation report indicates that the indicated sentence here under the guidelines would be a period of incarceration of less than six months, but I respectfully submit that there would really be no useful purpose served here.

Angelo Elusma has learned a lesson. He comes from a different culture and perhaps in his society that he grew up in as a boy it is a ltitle more acceptable to put one over on the government

if you can and it is not considered such a heinous crime.

Actually, we do consider it a heinous crime and we should, but in this case I think we have to take the full picture and that includes the man's background and the fact that he was doing something, not for any personal gain here, he was doing something to help two relatives.

THE COURT: My recollection of the matter is that there is evidence he had personal gain.

MR. POLLACK: Well, that is not my recollection of the evidence, your Honor. As I recall, the government made much of the fact that nobody paid him any money and they were driving here and driving him there and that this was the thing.

Yes, there was one piece of evidence. I think Denise Oliver changed

her original story and said that she had seen him either get or pay out money and handle money. Originally she had said no and then she changed her story.

I think that certainly that part of it is, while I am not asking the court to relitigate the question of guilt or innocence, I think certainly that part is something that is entirely open to question. I think he would be guilty whether he got money for it or not, but in view of his total character, I really believe that this is an offense that certainly will not be repeated.

I think that he has learned his lesson and I respectfully and strongly urge on the court that it consider the alternative of a probation to a short sentence of imprisonment which would be the guideline result.

I also have an application for suspension -- I am sorry -- for recommendation against deportation which was done on notice to Immigration. The general counsel for the New York City district, Mrs. Cameron, filed some papers in opposition and her opposition is basically based upon the fact that she says, well, this conviction for this crime per se, unless the sentence is an excessive one here, would not make him deportable because he is a permanent resident now and if he commits some future crime it might interfere in the theory if they wanted to say he committed two crimes involving moral turpitude.

I note that the probation report, it doesn't indicate who at Immigration they talked to, indicates that somebody at Immigration said that they were look-

ing into the possibility of deporting him.

Now, I submit that immigration law, aside from the one that makes a person who is convicted of two or more crimes involving moral turpitude or crimes of which the sentence to imprisonment for more than one year makes him deportable, there is also a section making him deportable as someone who assists others to evade the Immigration laws.

It is a little vague and I am not sure if he would come under it. However, the fact that the probation report indicates it, it leads me to believe that is a possibility.

I submit that Mr. Elusma, A, it is inconceivable, knowing him as I do, that he would commit another crime; B, the court could make it as a recommendation

conditional on his not committing another crime; and, finally, C, I suggest the necessity of this in view of the fact that somebody at Immigration told him that they are going to make an effort to deport him.

I submit Mr. Elusma, despite his lapse in this case, is in line with the American dream of the person who emigrates to this country. He works hard, he supports his family, he should be allowed to remain with his family.

I would, therefore, respectfully ask that the court grant the recommendation against deportation as well.

Thank you.

THE COURT: Mr. Elusma, you may be heard in your own behalf and may present any information in mitigation of sentence.

DEFENDANT ELUSMA: Thank you, your Honor. I have nothing to say.

THE COURT: All right, sir.

Does the government have any comments?

MR. MOSKOWITZ: Very briefly, your Honor. Your Honor, the evidence in this case, which your Honor has carefully reviewed and has entered findings of fact and conclusions of law, establishes that Mr. Darlington disgraced the legal profession by his conduct and violated his oath as an officer of the court and as an attorney for what apparently was not a significantly large sum of money. Mr. Darlington willfully and knowingly filed false petitions with the government on behalf of a number of clients.

I think there was mention in the probation report of the difficulty in

finding victims for this type of crime, but I would submit to the court, your Honor, that the government, the Immigration Service and the administration of justice were victims of Mr. Darlington's conduct. in fact, more significantly perhaps, the most harmed individuals were those clients who went to Mr. Darlington and were denied the counsel of a forthright attorney who would tell them that what they were doing was wrong and that there is an opportunity for them to get a green card legally and, thus, those clients who relied and trusted Mr. Darlington and conspired with him now face the prospect of being deported and never, ever getting their citizenship or their green card in the United States.

I would also note, your Honor, that as the Probation Department pointed out

this is not Mr. Darlington's first brush with ethical improprieties in the practice of law. The Probation Department indicated that Mr. Darlington was censored by the Ethics Committee and lost his job as an assistant district attorney or a county prosecutor.

THE COURT: I must say, Mr. Moskowitz, I am putting those items out of my mind. I don't think they are a proper factor to be considered in this sentence. I know the probation office is entitled to and should report that, but I am giving no credence to those.

MR. MOSKOWITZ: Very well, your Honor.

I would also note, your Honor, that the most important aspect from the government's perspective of this entire proceeding is that Mr. Darlington has

shown absolutely no remorse and to this day denies any culpability or any responsibility for his conduct.

It is the government's position and belief, your Honor, that under all of the circumstances Mr. Darlington for his crimes deserves a sentence of some incarceration because only a sentence of incarceration will advance the goals of general deterrence that such a sentence would help establish.

In addition, your Honor, finally I would note that given the nature of the crime and the fact that Mr. Darlington obtained some financial benefits from it, albeit small, a fine of some sort would be appropriate in this kind of case.

Thank you very much.

THE COURT: Would you comment as to Mr. Elusma, whether the court is correct

in his understanding that he got money?

MR. MOSKOWITZ: Yes, your Honor.

THE COURT: Otherwise I will have to take a recess and go through all this.

MR. MOSKOWITZ: There was testimony that at least in one of the instances Mr. Elusma was paid.

THE COURT: That is my memory of it.

MR. POLLACK: Well, as I said, Judge--

THE COURT: He didn't get paid for driving a taxi.

MR. POLLACK: They made a big point that nobody saw him getting paid for driving a taxi.

My recollection is that Denise Oliver flip-flopped and said in her trial testimony, as I recall, that she saw Angelo paying what's her name, Arlene Cureton. She didn't see him getting money but paying Arlene leaving the pre-

sumption that some of that money was for his fingers.

THE COURT: The court has that rather firmly fixed in mind.

MR. POLLACK: That was contrary to her grand jury testimony.

THE COURT: All right. Each of you defendants are informed that the judgment of conviction about to be imposed in this case is a final judgment of the district court and that you have an absolute right to take an appeal to the Second Circuit Court of Appeals by filing your notice of appeal within ten days and that this court will authorize any person claiming to be indigent to file the appeal without payment of fees.

Mr. Pollack, does your client understand his right to appeal?

MR. POLLACK: I haven't explained it

to him yet, Judge, but I shall.

THE COURT: All right. Are you applying to appeal in forma pauperis?

MR. POLLACK: I believe that will be necessary, Judge.

THE COURT: Application granted.

Ms. Cunard, have you explained to your client his rights to appeal?

MS. CUNARD: Yes, your Honor.

THE COURT: I gather he does not claim he is indigent?

MS. CUNARD: No, your Honor.

THE COURT: The Court will deal first with the case of Mr. Elusma. The court find that it is true that Mr. Elusma has been a hard working individual and that he has supported his family and he has not been a public charge.

However, the court views his case as representing an outrageous violation of

law with no remorse exhibited and the court believes that it is a serious crime involving moral turpitude and that the court sees no public purpose to be served in this case by recommending against deportation and declines to do so.

This is not to say that the defendant would not be entitled to make whatever case he can make with the administrative law judges in the Immigration and Naturalization Service and the court is not saying that he should be deported, but I am declining to make a recommendation against deportation because I regard his conduct as serious, involving moral turpitude and entered into at least in part for money.

Mr. Elusma is sentenced to the custody of the Attorney General for a term of commitment of 18 months on Counts 1,

19 and 20 to be served concurrently and he is continued on his existing bail pending appeal.

Mr. Darlington, your sentence is far more difficult for this court. The court agrees that you acted out of character in what you did here. However, people do that and the justice system has many cases people of otherwise high moral rectitude and good standing in the community, professional people, educated people who nonetheless do commit crimes.

These letters submitted today and the letters previously received by the court, a letter from Bishop Moore where he notes that Charles Darlington need not be asked twice to help a person in need. A very moving letter.

The letters reflect, as does the presentence report, that here we have a

defendant whose private life as a citizen has been excellent and highly productive and he has discharged all his social obligations to society and is a religious person and yet at the same time a practicing attorney who abused his trust.

He didn't do it for money because the fees that were charged in these cases were very modest and no greater than would have been charged in a legitimate case.

The court believes that the court must consider, as it has in Mr. Elusma's case also, the parole commission guidelines and the court must express society's requirement that lawyers obey their law themselves and not help their clients, knowingly help their clients to violate the law and while I had said earlier what you did is inconsistent with everything else in your life, your

actions on this trial record show sort of a callous disregard of your professional obligations and an attitude of sort of bad judgment which is unworthy of the profession. The court has to guard against these matters and express society's disapproval.

The court because there was no substantial financial aspect of this crime is not imposing a fine. A fine would punish the family more than the defendant usually.

The court finds that Mr. Darlington is sentenced to the custody of the Attorney General for a term of one year and one day on each of Counts 6, 10 and 18 concurrently and also continued on bail pending appellate finality.

All right. The court will be in recess.

MR. MOSKOWITZ: Your Honor, there is the matter of the special assessment.

THE COURT: Yes. Each of them is assessed $150 under the so-called Crime Control Act.

All right. Thank you.

MR. MOSKOWITZ: Thank you.

MS. CUNARD: Thank you, your Honor.

MR. POLLACK: Thank you.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of September one thousand nine hundred and eighty-eight.

UNITED STATES OF AMERICA,

Appellee,

V. No. 87-1519

DARLINGTON, ET AL,

Defendants,

ANGELO ELUSMA, CHARLES P. DARLINGTON, III

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Angelo

Elusma, Charles P. Darlington, III.

Upon consideration by the panel that heard the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

87-1519

USA v. Darlington NOTICE OF MOTION

state type of motion

for permission to file rehearing motion and supplement record

---

MOTION BY (Name, address and tel. no. of law firm and of attorney in charge of case)

Morosco and Cunard
99 Court Street
White Plains, New York 10601
(914) 997-9606
Janet Cunard

Has consent of opposing counsel:

A. been sought? / / yes /X / no

B. been obtained / / yes /X / no

Has service been effected? /X / yes / / no

Is oral argument desired? / / yes / / no

(Substantive motion only)

requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? / / yes / / no

B. by firm date of

argument notice? / / yes / / no

C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and of attorney in charge of case)

Hon. Rudolph Giuliani
One St. Andrews Plaza
New York, New York 10007
(212) 791-1990
Avraham Moskowitz

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL
Has request for relief been made below?
/ / yes / / no

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? / / yes / / no

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard?

/ / yes / / no

Brief statement of the relief-requested:

Permission to file a late motion for re-hearing and to supplement the record with proceedings had in the trial court on October 12, 1988 and for rehearing.

Complete Page 2 of This Form

By: (Signature of attorney)

Signed name must be printed beneath

Janet Cunard

Appearing for: (Name of party)
Darlington
October 14, 1988

Appellant or Petitioner:

/ / Plaintiff / X / Defendant

Appellee or Respondent:

/ / Plaintiff / /Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is ~~granted~~ denied

_____

_____

ORDER DENYING RULE 33 MOTION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

CHARLES F. DARLINGTON, III

Defendant.

----------x

October 14, 1987

2:00 P.M.

Before: Hon. Charles L. Brieant
Chief District Judge

Appearances:

Rudolph I. Giuliani

United States Attorney for the

Southern District of New York

Avarham Moskowitz

Assistant U.S. Attorney

Janet Cunard

Peter Bardunias

Attorneys for Defendant

(Case called)

THE COURT: We have a paper here which the clerk declined to docket because it didn't have a caption. But I have read the paper. What do you want to call it?

MS. CUNARD: It is a memorandum your Honor.

THE COURT: It is meant to be a memorandum of fact or law?

MS. CUNARD: Of fact your Honor. This was a continuation of the other papers that we submitted. Levitha De-Souza was not included in those papers and this should technically go beneath the other papers.

THE COURT: All right. I'll treat it as a memorandum. Do you wish to be heard at this time Ms. Cunard?

MS. CUNARD: Yes, your Honor if I may. Your Honor, we have done extensive

studies on the obliteration and it has been studied by several experts. We have not been very successful with photographing of the document. We have had two different people try.

However I do have a copy of the photograph or I do have a photograph which Mr. Moskowitz has seen and I would ask to hand up to the Court.

THE COURT: Please hand it to the clerk.

(Handing)

MS. CUNARD: And explain that what is being looked at is the white. It is not the dark color.

THE COURT: Well, I would have to say that I can't I cannot discern anything from this photograph. I have read Mr. Osborne's affidavit. I assume if called he would so testify.

But looking at this photograph, which really should be marked as a Defendant's Exhibit at this hearing, really doesn't tell me anything. If you read something into it that I can't, you're free to tell me what you think it shows.

MS. CUNARD: Your Honor, Mr. Osborne believes that it says birth something fifty-five.

THE COURT: That is what his affidavit says.

MS. CUNARD: And the birth would be starting at the left-hand side and you can see certain loops going up, looking at the white which would indicate the T. H. part. I believe comparing the photograph and his affidavit it is possible to see that.

COURT CLERK: Exhibit 1 marked for identification, Defendant's Exhibit A.

THE COURT: Received in evidence on this hearing.

(Defendant's Exhibit A - received in evidence).

THE COURT: Go ahead.

MS. CUNARD: Your Honor, this entire case is based upon a scam. Everyone was scammed. Mr. Darlington was scammed, the government was scammed and we believe even your Honor was scammed. Exactly what happened, how people were defrauded, we don't know. But the facts indicate that everyone was scammed.

Examining the first affidavit of Mr. Osborne, we note that five -- I am sorry, six of the individuals interviewed by the government were not the persons who signed the documents in Mr. Darlington's office. At that point, we don't know who the witnesses were. Were

the witnesses the persons who signed the documents, or were they the people who signed the forms for the government agents, or were they different people.

Each of these persons gave detail as to what happened in Mr. Darlington's office. They were not -- if they were the ones who signed the documents for the government, not the same persons who were in Mr. Darlington's office.

THE COURT: Well, Mr. Darlington knows who was in Mr. Darlington's office and Mr. Darlington had an opportunity to cross exmaine the witnesses. He could present his defense and I'm not able to say that there is any new or after acquired information or that the factual inference you now wish to draw is necessarily correct.

MS. CUNARD: Your Honor, the evidence

shows that the documents were not signed by the same people. Basically the I-130 and G-28 signed in Mr. Darlington's office were not signed by the same person who signed the withdrawal or the identification. Based upon different cases, either the same person who signed the withdrawal and identification was the same person who testified or the person who testified was the one who was in Mr. Darlington's office and did not sign those documents for the government. Now, Yolanda Smith is a very good example of that. One person signed the I-130 and G-28 and a different person signed an identification of Mr. Louissaint and at the same time --

THE COURT: I you know I think we ought to get off Yolanda Smith right away because your clients was acquitted on the

Smith-Celestin marriage.

MS. CUNARD: The only reason I mention it is because that particular case shows what the scheme was, what was happening.

THE COURT: That particular scheme shows what was happening in one of several hundred cases that he had, most of which the Court concluded at trial and the government did not argue, were entirely legitimate cases.

He had a very large poorly run legal practice with lots of people coming in and out and he had Marie Alphonse dealing with some of them and his innocence is not presumed, it is uncontested on all the cases that are not listed as counts in the indictment. If memory serves, he has almost a thousand a year, didn't he?

MS. CUNARD: No, your Honor he had in

toto about seventy of these cases.

THE COURT: Haitians.

MS. CUNARD: Yes.

THE COURT: But he had a lot of other cases too.

MS. CUNARD: Yes. This was a very small portion.

THE COURT: This Court has always inferred those case he had that were not mentioned in the indictment, were totally legitimate as far as his actions were concerned.

Now, he was acquitted on the Smith Celestin marriage and therefore, all you're doing is telling me that the Court was right in concluding that he should be acquitted on the Smith Celestin marriage and I am inclined to agree with you.

So what you have to do now is focus

on those counts where he was convicted and you say improperly. You have made a telling point on Count Eight of No. 1019, in light of the Osborne testimony.

But, you have not told me very much else about any of the counts he was convicted on and if the Smith Celestin situation was a scam or not, it is not of anybody's concern at this stage because he is not guilty in connection with Yolanda Smith.

MS. CUNARD: Your Honor, there were twenty-eight counts. This happened in seven of the counts. This is twenty-five percent.

THE COURT: Call my attention to any counts where he was convicted and if you can demonstrate to me that there is a reasonable doubt on such a count, that is all you have to do.

MS. CUNARD: Your Honor, with what is available to us we cannot show that the signatures were different on those different occasions. As the expert says, he does not have enough to work from.

However, we try to make the point to the Court that if this happened demonstrably in twenty-five percent of the cases, there is a reasonable inference that it also happened in other -- in the other cases.

THE COURT. I don't think that is a reasonable inference at all. He is only charged with what he is charged with. He is not charged with anything as to which he was acquitted and the only thing that you should concern yourselves with is his conduct in those counts which led to his conviction. And as to counts in which he was acquitted you and your clients are

entitled to rely on not only a presumption, but it is more than a presumption. By now it's an adjudication. So don't try to infer that because he was not guilty of any wrong doing in connection with Yolanda Smith that that tainted any of the other counts.

MS. CUNARD: Your Honor, it is not the not guilty of wrong doing. We refer to the scam perpetrated on him.

THE COURT: There wasn't any scam perpetrated on him in the counts as to which he was convicted. If you can show me he was, I'll change my point of view.

MS. CUNARD: Referring to Levitha DeSouza.

THE COURT: That is Count Eight, isn't it? That is the one that the Osborne testimony relates to.

MS. CUNARD: Yes, your Honor.

THE COURT: I think you have a very good point in talking about that count because the Court drew an inference that it was Ms. DeSouza's address that was scribbled out by Mr. Darlington. The Court can't see any reason for it being scribbled out and drew the inference that he was aware at the time he filed the Immigration documents that the newlyweds were living apart.

That is highly significant to Count Eight of 1017 as I told you earlier. If you want to say anything more about Count Eight you can, but then you ought to address any other counts.

MS. CUNARD: Yes, your Honor. Miss DeSouza initially told the agents that she was married in the summer of 1985. She was in fact married on January 7. That is a tremendous difference even if

she alleges she is getting married to make money. Not to be married --

THE COURT: That information was available to your client at trial, was it not?

MS. CUNARD: Yes, your Honor and it was used at trial.

THE COURT: I really think as far as DeSouza is concerned I would save time if I allowed Mr. Moskowitz to reply briefly, limited to Count Eight.

MR. MOSKOWITZ: Certainly your Honor. Your Honor, the only thing I'm going to address with respect to that Count since it's the only thing on which there is any facts or evidence of some sort, is the question of the obliteration.

And your Honor, what I would like to point out on that is two things. First of all, the Court I'm sure has heard

testimony, many times from handwriting experts and has seen affidavits from handwriting experts. And of that type of testimony your Honor, this is the least commital, least difinitive type of affidavit or testimony that I have ever seen.

I'm sure the Court has not seen anything quite as non-commital as this. The affidavit says, things like it may be this, it may, it possibly could be this. He doesn't take a position one way or the other. His basic answer is, I can't tell you what is said there.

THE COURT: I think he is trying to tell us it does not contain what the Court inferred it must contain and while he can't and Ms. Cunard does not give us any reason why a lawyer would obliterate that kind of thing on an office document

and as I may have commented to you earlier, I'm sure it was not his grocery shopping list that he crossed out. But I think with that particular Count the affidavit may be sufficient to raise a reasonable doubt. I think we shouldn't devote very much more time to the issue of Count Eight.

MR. MOSKOWITZ: Well your Honor, a number of things here which still have not been raised. First of all, and it has been the governemnt's position on this issue from the very beginning, this particular document was a defense exhibit. It was Mr. Darlington's papers. He has it up to the time of trial and during trial and he admitted it into evidence.

THE COURT: It was understand subpoenaed by the government.

MR. MOSKOWITZ: Only after he was

subpoenaed by the government.

THE COURT: And the government has a right to subpoena the document because it was a regularly kept record of a business.

MR. MOSKOWITZ: The government didn't know the documents existed your Honor. And when it became evident that Mr. Darlington was going to testify we asked for it. But in any event Mr. Darlington admitted it into evidence. It was a defense exhibit and I believe that under the legal standards, anything having to do with a document, can hardly be considered newly found evidence, given the fact that Mr. Darlington could have done this before trial. Secondly your Honor--

THE COURT: I agree with that. But if we take Osborne as truthful as I think I'm entitled to do and I don't think he is that vague.

MR. MOSKOWITZ: He doesn't say at all what is written there. He says, and I draw the Court's attention to the numbered paragraphs on page 2 or the lettered paragraphs, there is not a single paragraph there that says what it is, that says what is written under there.

It says it is my opinion that it could be, meaning he can't make --

THE COURT: He does say that. It does not contain 127 East 117th Street, which this Court assumed as a trier of the fact, or rather the Court inferred from the totality of the evidence before it and the highly unusual way that a lawyer would take his interview notes and mark them up like that, that that is probably what was written.

MR. MOSKOWITZ: Your Honor, I think your Honor, that if the Court is in-

clined to credit this affidavit, as vague as it is, I think that to allow that to be taken into consideration without at least the opportunity to cross examine, clearly Mr. Osborne is not willing to himself to what is written there and having been hired as an expert by Mr. Darlington, he is certainly in that interest.

There is a certain amount of bias to say that it is not what the government thinks it is. When you can't say what it is, the inference is equally available on both sides. The only thing that he can identify is I believe he says there is a D.H. there which could just as easily be part of the T.H. from 117th Street. In Paragraph I, he indicates there is a D.H. But there is nothing else in this affidavit your Honor where he commits himself and to merely accre-

dit --

THE COURT: I think you might be entitled to cross examination. But I really think it would be milking mice. I don't think an expert of his experience and stature is going to change his testimony from the affidavit either favorably to the accused or favorably to the government.

And I think he has put down in writing under oath, exactly what he would have to and I think Count Eight is presented in a slightly different context. And I think we would be better to discuss the other counts.

MR. MOSKOWITZ: The only other point I wanted to make on that your Honor, is clearly there were other factors in addition to the question of the marked out document which was argued, but which is

not the only testimony in that count -- I mean not the only evidence.

THE COURT: At least in this Count's view it made a tremendous difference in Counts Eight and my discussion in effect tells you that, because as was the indication in some of the other counts there were problems as to the weight of the evidence and the credibility of the witnesses. And I see it was in juxta-position to where the addresses are put and you have without some corroboration you have DeSouza, as not a particularly credible witness.

I think we should address the other counts. Really, I do. All right Ms. Cunard, what about the other counts.

MS. CUNARD: Your Honor referring to Lisa Beechum which is Count Ten of the first indictment from the Court's deci-

sion, it appears that a kick that was testified to was significant in reaching the conclusion.

Subsequent to the trial we were able to speak to and interview Barbara White. She like a number of other witnesses was not available for interview prior to trial and the efforts to interview witnesses is set forth in an affidavit of Jesse Kimball. Corresponding to Ms. Beechum, the kick was when Barbara White's husband was paying Mr. Darlington and Barbara said where is mine, something that she was not supposed to have said.

She has told us that she was paid outside of City Hall after she was married to her husband. If she was paid prior to going to Mr. Darlington's office, there was no reason for her to have

said that when her husband was paying Mr. Darlington, where is mine.

Lisa Beechum is the only person who has ever said that Barbara White was not paid until after she left the attorney's office. Barbara White testified in the Grand Jury that she was paid before her marriage. She tells us it was after her marriage. But it was at City Hall.

Now, Lisa Beechum testifies that the only reason that she was married was its money. She has given four different stories as to when she was paid. If she doesn't know when she was paid, how would she know when Barbara White was paid. Barbara is the one who would know and she said, no, I was paid before I went to the attorney's office and there was no reason for that kick.

Lisa Beechum claims that she and

her husband gave different addresses and that Barbara White and her husband gave different addresses and that Barbara even said, I'm going to be living at home. Now that Barbara White has been interviewed she says no, she does not mention what Lisa said. She doesn't remember what Lisa said. She said I said I was going to be living with my husband and we gave the same Sears Avenue address.

Now Lisa Beechum really doesn't know whether she signed anything at the attorney's office or if she did, what she signed. She said she refused to sign the I-130. She said she didn't sign it. She said she signed it. She said she signed a blue document and a yellow document. She said she signed a blue document and a white document. She said she signed a bunch of papers. She said that

the document that she signed was white. She doesn't know if she signed anything or if she did, what she signed.

She describes the wrong practice in the office. She has got Mr. Darlington doing an intake. She has Marie doing an intake on a manilla folder, something that never happens. The intake shows that Marie did it.

She doesn't know what happened to her birth certificate. The attorney tried to keep it she wouldn't let him. The attorney made a copy, gave her back the original. The original document is still in the file. She did not get that original document back.

She claims that when she and her husband witnessed Barbara White's marriage. Then they went to their own marriage, then they went to Mr. Darlington's

office. If Lisa's husband was a witness at Barbara White's marriage, he was never in Mr. Darlington's office and again that is the affidavit from Mr. Osborne, that anybody looking at the piece of paper would note differences without even being an expert, as is the case in so many of these. The marriage license application has faulty biographical information. The intake of in Mr. Darlington's office appears to have correct information. It is quite different, but usually that information matches any documentary evidence available.

Now Barbara -- I am sorry, if Lisa Beechum does not know if she signed a document, if she did what she signed, if she doesn't remember when she was paid, if that is the only reason she got married to be paid, if she doesn't know

what happened to her birth certificate, she apparently has no recollection of anything.

Now, it appears to be critical about a kick and a comment made before Mr. Darlington. Barbara White says, I was paid earlier, that is not critical. If Lisa Beechum doesn't know what happened as it relates to herself, how is her memory so good on Barbara White? Her memory is not supported by what Barbara White says happened to Barara White who was a person who was getting the money. Does your Honor want to hear from Mr. Moskowitz on this count?

THE COURT: No, I think you should finish. But I think I ought to ask you to concentrate on those facts which under the case law would entitle you to a new trial, becaue I feel now what you're do-

ing, you're making an attack on the findings and inferences to be drawn from what was before the trial court, and that is not really what this motion is about. Recently discovered evidence is what this motion was founded on, if I understood it correctly at the time.

MS. CUNARD: Yes, your Honor and I am.

THE COURT: And so far I have not heard anything that was particularly significant on newly discovered evidence except that you were able to get Osborne to look under the blotch that he made on the yellow sheet.

MS. CUNARD: We were able to interview Barbara White and she said that what Lisa testified to did not happen. She tells us she was paid before they went to the attorneys office. That is

new evidence. We could not talk to Barbara White before.

Now the persons who had been arrested to be released pending disposition of their charges all signed agreements not to have any contact with anybody involved in the case. None of these people would talk to us and if they had, they would have been violating the conditions of their release.

MR. MOSKOWITZ: Your Honor, can I respond to that?

THE COURT: This has me a little puzzled.

MR. MOSKOWITZ: None of the witnesses other than the co-defendants named in the indictment were ever arrested. Ms. Cunard for a change is making baseless accusations. The agreements between the witnesses and the government were

testified to and they were gone over on direct and on cross examination and the government brought it out and they were gone into adnauseam. Miss White at this Point as your Honor knows, was arrested in the middle of the trial, pled guilty to a crime in this Court and received a sentence of a year, from Magistrate Tyler and the government recently filed the papers in opposition to a Rule 35 motion and Magistrate Tyler upheld his sentence. Miss White has every reason to now want to retract her statement. That is the count where she did not testify.

MR. MOSKOWITZ: But they are using it to attack as newly acquired evidence.

THE COURT: Nothing prevented her from being interviewed prior to trial.

MR. MOSKOWITZ: Certainly not any agreement she had with the government.

In addition your Honor, I note she was in Court for many days on end, she could have been served with a subpoena. The defense was given the notice of interviews that she had with the government, her Grand Jury testimony and all relevant documents.

THE COURT: I would not have interrupted Ms. Cunard's presentation except for the reference to this agreement which came as a surprise. No such agreement exists.

MS. CUNARD: Your Honor may I. hand up -- I did not say with Barbara White.

THE COURT: What are you talking about now?

MS. CUNARD: I said this is Arlene Cureton. I said --

THE COURT: Arlene Cureton had all the 3500 material here and she was fully

cross examined.

MS. CUNARD: Your Honor I said that we had no opportunity to interview these people. The persons who had been arrested have as a condition of their release -- it is handwritten on the second page that there shall be no contact with anyone involved in the case. We were not able to interview those people. They would have violated that condition.

MR. MOSKOWITZ: The defense is taking a standard bail condition which is, that you not intimidate.

THE COURT: It says no contact with anyone to do with the matter. But I think that is all merged in the trial. She was fully cross examined at trial and I gather her bail was a matter of public record and since June 16th, 1986

in this Court and it was very simple for anyone who wanted to look up under Arlene Beverly, Arlene Charles also known as Arlene Cureton, it is kind of a stupid bail condition, but that is beside the point.

MR. MOSKOWITZ: It is not one the government imposes. It is on a standard form used by the Court.

THE COURT: No, it is written in. I think this will have to be marked for identification also.

(Defendant's Exhibit B marked for identification).

MR. MOSKOWITZ: Your Honor I would note for the record.

THE COURT: It is not a basis for a new trial. It may be a foolish arrangement. But it is not a basis for a new trial as far as Cureton is concerned.

MS. CUNARD: Your Honor --

THE COURT: You say that White had the same agreement.

MS. CUNARD: No. I did not say she had the same agreement your Honor. I would refer to an affidavit of Jesse Kimball dated October 31, 1986, where he attempted to speak to a number of these people and they all said, they were advised not to talk to him he could not talk to these people. And the arrangers, the persons who were intimately involved in this could not because of conditions of their release.

It was not that people did not try to talk to people. They refused to talk and again I go back your Honor to the problem with the identification. Who is it. We're dealing in a lot of these cases if not all with at least two people claiming to be the same person.

THE COURT: I don't recognize that to be true and if it was true, that was a matter which could have been fully explored at the trial of this case.

If you have new material I'm anxious to hear it. But you're giving me sort of the tails of Shahar Azad here and I have to come to an end. All these people were here. Their 3500 material was produced. White was available for subpoena. The government didn't put her on as a witness because after she robbed a juror they had reason to believe her credibility wouldn't rate very high.

If she is incontrollable as a government witness she is equally incredible as a defense witness. But you could have called her.

MS. CUNARD: Yes, your Honor. Under the circumstances it would not have done

much good to call her.

THE COURT: Who would believe her? But it is not newly discovered evidence.

MS. CUNARD: A lot of people with criminal charges and records have been believed.

THE COURT: I understand. But it is not newly discovered evidence. Go ahead.

MS. CUNARD: On Levitha DeSouza, we received prior to trial --

THE COURT: Aren't we through with Levitha DeSouza? That is only Count Eight.

MS. CUNARD: Yes, your Honor. Well I won't refer to her. Then on Andrew Parris, Beechum and Albert Thomas, we did not receive the original interview notes of the agents and we have found in the one case where we did receive those notes, there was substantial differences

between the original notes and the typed notes that were given to us.

THE COURT: Which witness is that?

MS. CUNARD: The only one we got it on was Levitha DeSouza.

THE COURT: Which one did you say was different?

MS. CUNARD: Levitha DeSouza, there is substantial differences between the original notes.

THE COURT: We're not talking about Levitha DeSouza anymore because that is Count Eight.

MS. CUNARD: I'm saying your Honor we did not receive the original handwritten notes in the other cases.

THE COURT: Of what witnesses?

MS. CUNARD: Andrew Parris, Lisa Beechum and Albert Thomas.

THE COURT: Which witnesses pertain

to counts on which he was convicted?

MS. CUNARD: Those three your Honor.

THE COURT: What about that Mr. Moskowitz?

MR. MOSKOWITZ: Your Honor as the Court may recall --

THE COURT: Don't assume I may recall. This is not a career case, this. Is one case of hundreds.

MR. MOSKOWITZ: Your Honor there was a point during the trial where Mr. MacCreery on behalf of the defendant said, do you have other notes. The government asked the two witnesses -- asked the two agents sitting here who went back and searched through its file and provided whatever notes were available.

What normally happened was that the agents took notes that they then incorporated into a statement and they did

not keep the scratch notes and that is--

THE COURT: Is the trial record clear on that?

MR. MOSKOWITZ: The trial record is clear that a request was made for all original notes and that those notes to the extent they were available were turned over and to the extent that they don't exist or never existed they were not turned over because they are not present.

And your Honor, I represent to the Court, as an officer of the court that every single piece of 3500 material, whether it be my interview notes or whatever the agents maintained, has been turned over and all testimony or other prior statements of any of the witnesses has been turned over.

MR. MOSKOWITZ: Your Honor, one other

point I would make, that the during this post trial period, when Mr. Darlington was trying to come up with new evidence, at the Court's suggestion, I opened my files completely and there are boxes and boxes of files and Mr. Darlington and his representatives had an opportunity to sift through it and I represent to the court haven't found anything additional.

THE COURT: Is there a Buffolino violation lurking around?

MR. MOSKOWITZ: No, absolutely positively not. The government has more than complied with its obligations.

MS. CUNARD: Your Honor, we were shown Mr. Darlington's files and we looked through them.

We did not see any work product of the government when we examined those

files.

THE COURT: The question is did you have full compliance with Seciton 3500 and the Brady Rule. That is the only question. And even that question at this stage is limited to the counts at which he stands convicted.

MS. CUNARD: Those there are the three counts I mentioned.

THE COURT: The Court hears the representation about the notes, I have no reason to disbelieve it at this stage.

MS. CUNARD: There is also Mr. Parris testified that he made an identification of Alton (phonetic). Celestin and we have never seen that identification of Alton Celestin and it is my understanding that Mr. Celestin is now dead.

THE COURT: What is the significance?

MS. CUNARD: This is a conviction. I

don't know who signed it or what else is written on it.

THE COURT: Parris made an identification. Where is that discussed in the findings.

MS. CUNARD: I don't believe it is discussed in the findings your Honor.

THE COURT: I have no recollection of at this point, at this is particular time that he testified he made any identification or whether he was asked whether he made any identification and maybe I'm missing the point of your argument.

MS. CUNARD: Your Honor, many of these identifications and withdrawals had handwritten notes attached to it above the signature. I have no idea what is on that identification. I don't know what he said.

THE COURT: Can you show it to me?

MS. CUNARD: I am sorry your Honor.

THE COURT: What are we talking about.

MR. MOSKOWITZ: I haven't the foggiest idea your Honor.

MS. CUNARD: Your Honor on 3510A interview notes from August 12, 1986 it says "he identified a photograph of Alton Celestin from among a group of photographs as being that Haitian."

THE COURT: He being whom, interview notes of whom?

MS. CUNARD: I believe it was the interview notes of unsigned.

MR. MOSKOWITZ: May I see the document your honor?

MS. CUNARD: Certainly.

(Handing)

MR. MOSKOWITZ: Your Honor this document is interview notes prepared by agent Zaruba.

THE COURT: Whom was he interviewing?

MR. MOSKOWITZ: Mr. Parris Andrew Parris. But I don't know what the significance is.

THE COURT: Which count does that have to do with.

MS. CUNARD: Six your Honor.

THE COURT: You see I'm trying to leaf through the findings which unfortunately don't have any index.

MS. CUNARD: Your Honor that would be page sixty-four.

MR. MOSKOWITZ: Your Honor if I might just point out to the Court what Ms. Cunard is discussing and why I have no idea, during the interview of Mr. Parris, he identified an individual as being a Haitian who happened to be around when he got married and he recognized the person and we had a picture of him which we had

gotten during the course of the investigation.

THE COURT: But it is now stated that that Haitian was dead at the time. That is the argument now being made.

MS. CUNARD: No, your Honor I am sorry.

THE COURT: When did he die?

MS. CUNARD: He died a couple of months ago.

THE COURT: How is this significant?

MS. CUNARD: Your Honor, he was the person who was a witness at the marriage and the witness at the marriage supposedly went to Mr. Darlington's office and did all the translation for Janis Parris who supposedly could speak no English.

Now there are statements on most of these photographic identifications and

withdrawals there is a handwritten addendum that says something else about the case. I don't know what it says about who or what Mr. Celestin is or what he did.

THE COURT: I don't find him mentioned in my findings and I don't have any independent recollection of him in connection with this particular marriage.

MR. MOSKOWITZ: There was no evidence about it at trial.

THE COURT: That is understandable that it would not be in the findings.

MS. CUNARD: Your Honor, it states a French interpreter interpreted for them. The testimony showed that the person who witnessed the marriage was a person who interpreted on the marriage license where the witnesses are shown.

THE COURT: This is the one where

lestin.

THE COURT: The parties were married at Mount Vernon after they got a marriage license in Mount Vernon and a friend interpreted for them which you're probably quite right in saying it was Celestin.

MS. CUNARD: He was the one who signed the license as a witness to the marriage.

THE COURT: But he is not a party.

MS. CUNARD: No, he is not a party to the marriage. He is a witness.

THE COURT: There is no finding on my part that Celestin was in Mr. Darlington's office.

MS. CUNARD: No, your Honor.

THE COURT: Well, what is the significance of the identification of Celestin?

MS. CUNARD: I believe that that

might be Brady material and it is at least 3500 material.

THE COURT: But they gave it to you.

MS. CUNARD: We never saw it your Honor.

THE COURT: You saw the agent's notes. That is the 3500 material.

MS. CUNARD: I saw the note, but I did not see the statements signed by Andrew Parris.

THE COURT: Parris never testified? Yes he did.

MR. MOSKOWITZ: Your Honor, the witness was shown a number of photographs. He identified a person. It was a lead that never panned out. We never found Mr. Celestin. We never connected him up to the case. We never had a statement on it. We had the witnesses sign photo spreads. They identified a defendant or

suspect in the case, Mr. Celestin wasn't a defendant, suspect, or involved in fraudulent marriages.

THE COURT: Were those interview notes turned over?

MR. MOSKOWITZ: Yes.

THE COURT: So if they asked for the picture they would have been entitled to it.

MR. MOSKOWITZ: If she had -- they had asked for the picture.

THE COURT: Where is the picture?

MR. MOSKOWITZ: Your Honor we can look for the picture.

THE COURT: I don't know that it would be of any significance. But you were alerted to its existence and if you asked for it you could ask have seen it.

MS. CUNARD: Your Honor there was a complete demand for discovery.

THE COURT: But when you have a document referring to a man signing a picture, that is enough to put you on notice of the existence of the picture.

MR. MOSKOWITZ: He didn't sign the picture your Honor. He was shown a picture. He said I know this guy. We knew it was Altien Celestin. He identified him. But it was a person that had nothing to do with the case as far as we could understand. So we didn't have him sign a statement on it like they did when they identified defendants.

THE COURT: He is at least arguably a co-conspirator.

MR. MOSKOWITZ: Your Honor, we have to work with evidence. We can't make that assumption.

THE COURT: But I think the existence of the photograph was known to counsel

there had been a prior divorce handled by his law office.

MR. MOSKOWITZ: That is correct your Honor.

MS. CUNARD: Yes, your Honor.

THE COURT: Then the other spouse came in with an American spouse.

MS. CUNARD: Yes, your Honor.

THE COURT: I don't see anything in the Court's findings concerning that count which relies on whether or not Mr. Parris identified correctly or incorrectly Mr. Celestin and I don't find any mention of Celestin and unless you can connect that up with me your argument doesn't seem to have very much force.

MS. CUNARD: Your Honor Mr. Parris testified that the person who witnessed the marriage, went to Mr. Darlington's office with him. He testified that there

was a translation by this Haitian for Janis because she could understand no English. And I believe that no adverse inference may be found solely on the language barrier as stated in your Honor's decision.

THE COURT: Parris testified he could not communicate with his wife.

MS. CUNARD: And that there was a Haitian who translated for them.

THE COURT: And you think that is Celestin?

MS. CUNARD: Your Honor, it shows on the marriage license that it was Altien Celestin.

THE COURT: Well that pertains to his testimony at the city clerk in Mount Vernon where your client was not present. That does not show your client was present in Mr. Darlington's office with Ce-

at the time of the trial. So I don't think the failure to turn it over constitutes a Brady violation or any other kind of violation

MS. CUNARD: Your Honor, the request was made for all documents including that statement.

THE COURT: It is now represented that there was no statement except an oral statement that was -- that he was shown a picture and he said yes, that is Celestin or yes, I know that man. And the government already knew it was it was Celestin.

MS. CUNARD: Your Honor there was also a representation made that they could not find Celestin. And there is a good question as to how they cannot find somebody if they know who it is and that would raise another issue

indicating that they had a group of photographs and they did not know who these people were, and that they asked for an identification.

Also since trial, we have located and spoken to Janis Parris. Janis Parris has told us that she divorced her prior husband because they were not getting along and Mr. Darlington knew that. He was told that, that she married her husband for love and for someone to support her and take care of her, and she was married for love and that they were living together.

THE COURT: As soon as you finish this point, I'll have to suspend because I have a brief matter I have to hear at 3:00 o'clock. Then I will resume the discussion. The significance of that information, that is nothing new, is it?

MS. CUNARD: Yes, it is your Honor.

THE COURT: How is it new; what she told Darlington? Contemporaneously Darlington knows exactly what she told him.

MS. CUNARD: But we didn't have anything from her. We could not find her to talk to her. These people are not easy to find.

THE COURT: I don't see any significance in that at all. It is not newly discovered evidence. If you could find her now you could have found her then. I think we're getting off on a lot of minutia that has no significance.

MS. CUNARD: She has moved a number of times.

THE COURT: Was the government concealing her?

MS. CUNARD: I have no evidence to that effect.

THE COURT: I think we have to adjourn briefly so that I can hear another matter.

(Recess taken)

(Time noted - 3:00 P.M.)

(Case recalled)

(Time noted - 3:20 P.M.)

THE COURT: Please resume.

MS. CUNARD: Your Honor, when we were able to locate Janis Parris, she told a story directly contrary to that that had been told by Andrew Parris at trial. Now Mrs. Parris had moved. I don't know where in New York and we found her in Florida. She is no longer living where we found her. We just don't know where she is anymore and apparently she had been doing this before.

She is very difficult to find. But the government did not interview any of the Haitians to see what they had to say and she said she married for love, and that she told that to Mr. Darlington. Now the only other person we could have talked to would have been Andrew Parris. We still cannot find Andrew Parris. His family doesn't know where he is. We asked.

THE COURT: He testified at trial.

MS. CUNARD: Yes, but we have not been able to find him your Honor, at any time.

THE COURT: He testified at trial. He was right here in that Witness box. He was fully cross examined.

MS. CUNARD: We assume it was Andrew Parris. But we have not been able to find him at any time.

THE COURT: The trial is over. You don't have to find Andrew Parris. He testified. He is not newly discovered evidence.

MS. CUNARD: I'm talking about trying to find people. We have tried right along.

THE COURT: I don't see any significance whatever in the failure to find Andrew Parris. If I don't understand your argument you better make it clear. The trial is over. He was here. He was cross examined and now he is missing.

MS. CUNARD: He always has been.

THE COURT: No. He was here at trial.

MS. CUNARD: Well, he was missing except for that day your Honor. We have never been able to find him.

THE COURT: I am sorry. You have

said that several times and without being brusk in any way, my response is so what if you can't. I don't understand the argument you're making. He came here. He testified at trial. He was available to you for cross examination at trial. The confront takes clause was satisfied. The trial is over and now you can't find him, what difference does that make?

MS. CUNARD: We have never been able to find him, your Honor and this is before, during and after.

THE COURT: Well, during the trial he was right her. Go ahead.

MS. CUNARD: Your Honor, that marriage was purportedly arranged by Denise Oliver. She was not available to the defendant prior to trial because of the release agreement. We were not able to talk to her. Albert Thomas, Merita

D'Haiti, Count Eighteen of the Indictment. Albert Thomas testified on the Louissaint trial which was after this trial, and at that point he testified about his record in a completely different fashion than he had testified in this trial. Needless to say, we could not have anticipated what his testimony might have been.

THE COURT: How was it different about his record?

MS. CUNARD: Your Honor he says he has been in federal custody since 1986. He testified he was at Fishkill Correctional Facility.

THE COURT: That is not ordinarily regarded as federal custody.

MR. MOSKOWITZ: Can we end this point right here? I have for the Court, a copy of the writ signed by Judge Ward in February of this year.

THE COURT: Show it to counsel first please.

(Handing)

MR. MOSKOWITZ: Which got Mr. Thomas out of Fishkill, which is a state facility. I venture to guess your Honor without having reviewed the Louissaint transcript, because I have not yet received a copy, that the date of February 1986, was probably a typographical error in the transcript, as the Court notes happens occasionally.

And apparently your Honor, the question of where he was, was probably one that could be resolved without all the accusations of secrets with the government which Ms. Cunard found to put in her papers.

THE COURT: He was serving a sentence even if he was here on a writ.

MR. MOSKOWITZ: That is correct, your Honor.

MS. CUNARD: He was also in New Jersey.

THE COURT: What was he in New Jersey on?

MS. CUNARD: He is now in.

MR. MOSKOWITZ: Your Honor he is now in New Jersey because he has a separate New Jersey sentence which ran consecutive to whatever time he was doing in Fishkill.

MS. CUNARD: He was also taken back to New Jersey to do perhaps the strangest thing that happens in Court. He was sentenced to two years probation in November of 1986 in New Jersey.

Suddenly for no reason, and it doesn't -- the reason does not appear in the New Jersey records on February

18th, 1987, he went back to New Jersey, and was sentenced to a term of two years imprisonment concurrent to the New York to the New York charges.

He was in custody the entire time. There is nothing in his record that could have changed -- that would have warranted a change in sentence.

THE COURT. The sentence was made more onerous.

MS. CUNARD: Yes much more onerous. He had two years probation concurrent. Then he was resentenced to two years imprisonment consecutive.

THE COURT: By the state of New Jersey authorities?

MS. CUNARD: Yes, your Honor.

THE COURT: What inference am I to draw from that?

MRS. CUNARD: That it is a very

strange happening, especially when he testifies that he was in federal custody for a year. Now the writ says that February -- I don't recall whether it was 18th or 19th that the warden was to turn him over from Fishkill to the federal authorities to appear. Well he was in New Jersey. Then he was not at Fishkill.

THE COURT: Could I see his trial testimony? Do we have the transcript.

MR. MOSKOWITZ: Your Honor I would point out just to help the Court on this matter. Agent Goodspeed is sitting here. Two weeks before Mr. Thomas or Mr. Scott came down from Fishkill Agent Goodspeed went to interview him in Fishkill. He was in Fishkill your Honor. The marshals brought him from Fishkill. There was a writ from Fishkill that was satisfied. Whether the wrap sheet indicates some-

thing else, and maybe an error, I can't answer that. But I know he was in Fishkill because we brought him from Fishkill.

THE COURT: Well, I'm waiting to get to the bottom line of the argument, assuming they didn't bring him from Fishkill, but they brought him from New Jersey, how is that significant to what we're talking about?

MS. CUNARD: He lied about his status your Honor. And if we had known about lies about his status we could have inquired further about his record which would have been significant. There was also a document signed by Yolanda Smith.

THE COURT: This Court found that he was at the time of the trial, a state prisoner in Fishkill and that he had a lengthy prior criminal record and that

is an understatement and our writ here shows that he was brought from Fishkill and that the writ was satisfied to Fishkill.

So I don't see that that finding is erroneous. I don't think you have demonstrated that that finding is erroneous. Our own court records show the writ was issued to the State of New York and he was brought from the State of New York into federal custody, and then released to the State of New York and I don't see that it matters if it was New Jersey instead of New York. But that is what the Court record shows. You're impeaching it by some statement made by this hoodlum in a later trial. But our court records which ought to be controlling on this issue, mean to me that the finding of fact on page thirty-three is a correct

MS. CUNARD: Then your Honor he had to have lied at one place or the other.

THE COURT: After this trial he lied in the other trial. I don't see much significance in that.

MS. CUNARD: Yolanda Smith gave a statement that her marriage was witnessed by Jean Louissaint who signed the name Alan Smith. Mr. Osbourne's affidavit says that that Alan Smith was not signed by Jean Louissaint, but was signed by Albert Scott Thomas. When Charlotte Allen was interviewed, there was an obliteration on that document. That document has since been read through the obliteration to show that the marriage was arranged by Allen with Trish.

THE COURT: What count are we talking about now?

MS. CUNARD: I'm talking about Albert

Scott Thomas your Honor.

THE COURT: Go ahead please.

MS. CUNARD: If Albert Scott Thomas signed as a witness to Yolanda Smith marriage, and the marriage was arranged by Allen, it appears that Albert Scott Thomas was in fact an arranger and that his testimony at trial as to his participation was false.

THE COURT: That he did not marry Merita D'Haiti.

MS. CUNARD: It does not say that he did not marry Merita D'Haiti. What it says is that he did not simply participate in a marriage; that he was in fact an arranger of marriages.

THE COURT: If the marriages are bona fide, it is perfectly all right to be an arranger of marriages. Which marriage are you saying he arranged.

MS. CUNARD: Charlotte Rene Allen and probably Yolanda Smith.

THE COURT: But they are not the subject of any counts on which anybody was convicted of anything.

MS. CUNARD: No, your Honor, they are not. But Albert Thomas is involved.

THE COURT: Fine. He has a right to be involved.

MS. CUNARD: As a principle?

THE COURT: As a witness for all we know.

MS. CUNARD: According to Charlotte Allen, as an arranger.

THE COURT: There is no indication that those marriages are fraudulent. You can't have it both ways you know. There is no indication of any wrong doing on Yolanda Smith's charge.

MS. CUNARD: Your Honor, she testi-

fied about wrong doing.

THE COURT: Did the Court find your client's guilt or innocence?

MS. CUNARD: Not about Mr. Darlington doing anything, but about her marriage being fraudulent.

THE COURT: I don't see anything significant in that as far as being an arranger. That is certainly only cumulative to his prior criminality which is very extensive.

MS. CUNARD: Now the testimony was that the principal reason, in fact the only reason that this marriage took place was for payment. Mr. Thomas did not remember how he was paid. He testified that he received five hundred dollars from Mr. Louissaint at the railroad station after he was to the attorney's office, then that he got another

anything other than Count Eight of 1019.

MS. CUNARD: Your Honor, it is found by the Court that she met her husband a day before the marriage and was offered six hundred dollars. The testimony as I recall it, was that it was a thousand dollars. But she had to give Michelle Griffin four hundred dollars for arranging it.

Then she testifies subsequently on the Clyde Day trial, on -- no, it was only for seven hundred dollars and I had to give Michelle Griffin one hundred dollars.

If these people are really getting married for money, the one thing that they would remember is how much and when they got paid. Instead, they make statements about what happened in the attorney's office as gospel. But they don't

remember the facts surrounding that which is most important to them. Their testimony is all incredible when put together with subsequently developed facts and put together one case with another. Thank you, your Honor.

THE COURT: Mr. Moskowitz.

MR. MOSKOWITZ: Your Honor, I have nothing to add to what was put in the papers. I believe that all the points made by Ms. Cunard, were properly the subject of cross examination at trial. The Court has made the finding on the credibility of the witness. Other than Mr. Osbourne's affidavit which I was served with today, there is not a single shred of newly discovered evidence. All these witnesses were available or could have been available to the defense, at, before or during trial. And they were

five hundred dollars from Louissaint when he asked him for it.

He additionally claims to have gotten some money from his wife in small amounts. Then at the Louissaint trial he changed his testimony to state that he got five hundred dollars from Mr. Louissaint after the trial, and then fifty dollars from Mr. Louissaint later, and the remainder of the five hundred dollars from his wife. Now if the principal reason that he got married -- in fact the only reason as why he got married was for the money, that should be one thing that he remembers about this whole scam.

Instead, he doesn't remember that. But he remembers all these little details about what was done wrong, such as he had to practice signing his name. His wife had has to practice signing her name,

things that were not done in those days and the reasons are set forth in an affidavit of Marie Alphonse.

Now, none of these persons knows when he got paid. Mr. Thomas changes his testimony. Mr. Parris gave a statement that I got three hundred dollars after the wedding, then two hundred dollars after the attorney. Another time he says two fifty. And two fifty at least he has got the total right. Lisa Beechum doesn't know when she was paid. She has herself paid at every conceivable point in time depending upon when she is making the statement. Levitha DeSouza says she got --

THE COURT: No more about Levitha DeSouza.

MS. CUNARD: Yes, your Honor.

THE COURT: Unless it pertains to

not called. The defendant had two opportunities at this is trial. Your Honor, there is nothing that entitles him to a third trial.

THE COURT: The Court will discuss the matter beginning with Count Eight of 86 Cr. 1017. The case is unusual in that the Court sat as a trier of the facts. And the Court tried with I thought considerable detail, to make clear the inferences which the Court was drawing from the evidence and the conclusions the Court reached based on the Court's observation and a very careful study of the record post-trial. And I really think that some of this motion is merely reargument of things which were already before the Court at trial, and an unnecessary attempt to substitute this procedure for an appeal.

Be that as it may, on Count Eight of 86 Cr. 1017, in reaching that conclusion as do whether or not the government satisfied its proof beyond a reasonable doubt, on that count, this Court did rely on this paper. This was a record in the law office which had been obliterated. And the obliteration was very near the place where the addresses are put and Marie Alphonse testified to the practice, which the Court noted and it is simply inexplicable that a lawyer would do such a thing.

But the inference is he did it and the Court believed it was entitled to conclude especially since he testified he could not recall what was in the section that was obliterated, that it was DeSouza's address. Therefore, he was aware at the time he filed the immigra-

tion documents that the newlyweds had told him they lived apart, although the documents as filed reflect a single marital residence. There is still a great deal of suspicion in here. But the Court is prepared to take Osborne at his word and the Court believes that if subpoenaed to testify, Osborne would tell the Court in his great experience which is well known and that he has ordinarily been accepted as a truthful and competent handwriting expert and his judgment is honestly reflected by the information contained in the affidavit, and that this would not be materially altered at cross examination and that he would adhere to his opinion, that whatever it could or could not be and he thinks it is likely, but not certain that it refers to birth or birth date, that it does not

contain the reference to the addresss of 127 East 117th Street. Nothing can ever be determined with certainty in this Court when dealing with such matters. But I really think that the Osborne, opinion while there is a lot of adverse inference that flows from handling of this piece of paper and the paper would have been admissible on the government's case as a law office business record, but, the Court believes that it must honor the obligation of a trier of the facts to prove guilt beyond a reasonable doubt. And there is now a reasonable doubt as to Count Eight.

So in as far as Count Eight is concerned of 86 Cr. 1017, the Court modifies its findings of fact and conclusions of law to the extent of finding Mr. Darlington not guilty on that count.

The Court will now consider the balance of the motion here for a new trial under Rule 33, and Mr. Darlington, in support of his motion cites newly discovered evidence claims of false information and testimony given at the trial, and alleged prosecutorial suppression of exculpatory evidence and Mr. Elusma has joined in this motion by a letter from his attorney dated June 27th.

The case law is quite clear. A Rule 37 motion is addressed at the discretion of the Court and should be granted only with extreme caution. And the Court relies on United States against Gilbert 668 F. 2d 1984 -- 1981 Second Circuit case. There are now before this court in as far as Mr. Darlington is concerned, three false statement counts involving his preparation and submission of immigration

documents in three sham marriages between Americans and Haitian aliens. Albert Scott, also known as Thomas with Merita D'Haiti, Andrew Parris with Genese Accius and Lisa Beechum with Inorable Alincar, and Elusma was convicted of conspiracy and aiding and abetting in the making of false statements. And the immigration petitions filed in the Faulkner Absolu, marriages and the Oliver Pierette marriage.

The Court is not considering any reference to documents or other problems arising out of the counts as to which Mr. Darlington or Mr. Elusma were acquitted. The Court has throughout the case treated each count separately, and is not concerned with Yolanda Smith or some of these other statements which have been made. The post conviction interview of

which have been presented here along with scrutiny of the documentary evidence supporting the counts, as presently relied on, do not seem to represent to this Court newly discovered evidence or evidence which could not have been ascertained within the course of the trial, either by cross examination or by any reasonable effort. And I don't think there is any newly discovered evidence sufficient to impeach any of the remaining evidence on which the Court relied.

The defendant would have to show first that the evidence was discovered after trial, second that it could not question with the exercise of due diligence have been discovered sooner, and third that it was significantly material so it would probably produce a different verdict. I have acknowledged

that possibility as to Count Eight of 86 Cr. 1017, and I don't see on the remaining three counts that there is any showing that the defendants exercised due diligence. And I find and conclude that the new evidence would be at best, cumulative and not significantly material to produce any different result.

It is quite clear that the government has or the nation has a legitimate interest in according finality to criminal judgments and just as there is no perfect crime, there is no perfect trial and our effort here is to do substantial justice in accordance with the evidence brought out and we simply can't chew everything over and over again. The defendant had in their possession prior to trial, every document on which they base their present claims of newly dis-

covered evidence of forgery and give no reason for conducting -- not conducting a handwriting comparison earlier, if different people went to the office or wedding, that would not necessarily exculpate any of the defendants here. Most of the documents have either been in the possession of Mr. Darlington or they were subpoenaed from his law office fires.

When I say that, I'm speaking of marriage license applications, birth certificates, I-130 forms and similar matters. The defendants knew well in advance of trial and had copies of these documents, and the Court finds no violation of the Brady rule or Section 3500, of Title 18 in the course of this trial or at any pre-trial stage and the defendant cannot be heard to claim at this late date that their discovery of hand-

writing discrepancies if such there be, could not have been made earlier with the exercise of due diligence.

These matters were repeatedly referred to and disected. And at trial and there was ample opportunity to challenge authenticity or impeach the witnesses through whom the documents were introduced, and failure to do so constitutes a lack of the required diligence to show that this information could not have been discovered earlier.

In as far as the Haitian spouses and Louissaint are concerned, the interviews of the Haitian spouses to the effect that their marriages were the result of love and affection and the parties did intend to lvie together, is certainly not newly discovered evidence. The defendant was aware prior to the

improbability of a different verdict where the proffered evidence could only impeach the credibility of witnesses and was essentially cumulative and not material, and where there had been sufficient availability of other impeachment prior to trial.

The Court finds as a matter of discretion that the newly discovered evidence as to the three remaining counts is immaterial and would not produce a different verdict. And so far as the handwriting is concerned that offered to prove either the Haitian spouses lied about their identities or that they were not present when identifying information was recorded, neither of these inferences is inconsistent with the findings of the Court because none of the Haitian spouses testified at trial.

And the evidence certainly does not contradict the other testimony as to Elusma's knowledge of and willing participation in the sham marriage scheme or Mr. Darlington's knowledge or reckless disregard as to the falsity of petitions he filed in behalf of the three couples referred to in the Court's findings. So, the Court does not believe that what is presented here requires the Court to grant a new trial on the remaining counts. The same applies to Scott Thomas. The statements attributed to Louissaint merely remove him from the scene of Scott Thomas' marriage. An interview with Darlington and that is at best exculpating and does not controvert Scott Thomas' testimony or the other evidence as to what took place in Mr. Darlington's office to give him notice of what was

no requests with regard to additional findings of the Court. The government is completely satisfied.

THE COURT: Ms. Cunard?

MS. CUNARD: No, your Honor. I have no requests.

THE COURT: All right. The Court orders acquittal on Count Eight of 86 Cr. 1017 and in all other respects the motions of Elusma and Mr. Darlington are each denied. And the clerk will set a date for sentence prior to which you're required to read the pre-sentence report which this Court has not yet examined. But it is around here somewhere.

Is November 10th all right?

MR. MOSKOWITZ: At the moment it is fine, your Honor.

THE COURT: Okay for you?

MR. MOSKOWITZ: Actually your Honor,

if we could have it on a Monday or Wednesday rather than a Tuesday or Thursday, it would make transportation easier.

THE COURT: November 9th. All right for you.

MS. CUNARD: Yes, your Honor.

THE COURT: All right. The matter is continued until November 9th for both Elusma and Darlington.

MR. MOSKOWITZ: What time your honor?

THE COURT: 9:00 A.M. All right. Thank you.

(Time noted - 4:15 P.M.)

I certify this to be a true and accurate transcript of the within proceedings.

Lisa Regen Hearing Reporter

trial of the existence of the Haitian spouses. They have been his clients. He could have interviewed them before trial or subpoenaed them to testify, and under the Natalie case, practical decision not to call a witness is not a basis for a post-trial assertion that the witness' version of the events is newly discovered.

Jean Louissaint presents a slightly different issue. He was tried separately and convicted after evidence was taken in the Darlington Elusma trial, but before this Court rendered its findings. And it is certainly true that he had the right to refuse to testify. However his present statements are not properly newly discovered evidence under the Jacobs case in the Second Circuit. And under the Jacobs case and similar cases, we should be cautious in granting a new trial based

on the severed co-defendants inability, because essentially what is offered is immaterial here in this case.

There is no showing that the evidence produced would alter the outcome of the trial. The forgeries and statements are being offered to impeach prosecution witnesses and thereby corroborate the defendant's testimony that he believed the marriages to be bona fide, and such evidence is essentially cumulative and under the rule of Agular 367 F. 2d 625, additional cumulative impeaching information ordinarily does not justify the granting of a new trial.

The Court might also look at United States against Pistell Second Circuit case 460 F. 2d, Sposato in 446 F. 2d and Trapnell at 495 F. 2d, and there is a large number of other cases where the

going on with these marriages.

I think the balance of the presentation does not require any discussion. The Court finds no indication of perjury in connection with the marriages as to when convictions resulted, and no evidence of government participation in any perjury in the cases where there were no convictions. The complaints about the lack of intelligence of most of the government witnesses are hollow sounding because the government has to take its witnesses where they find them and the fact that they prepared or rehearsed the witnesses or refresh their memories during trial does not constitute prosecutorial misconduct in the context of this case, nor does it necessarily lead to an inference of perjury and the same is true of vagueness or inconsistencies

standing alone among witnesses who are essentially anti-social people or criminals or woefully ignorant people, or perhaps a combination of all of the foregoing, is not necessarily indicative of perjury and it is perfectly possible for such people to tell the truth. And in many cases the convictions have been founded on their testimony.

In as far as the misconduct of the Haitians is concerned, that is not material here to this case because they did not testify at trial as part of the government's case. And the Court also finds no evidence of any suppression of exculpatory evidence. He inadvertently misplaced the affidavit of Sonya Alvarez, also known as Leonia Anthony refers to no marriage except her own, and this Court found Mr. Darlington not guilty on that

Count. So there is no issue of suppression. And the Court believes they genuinely did lose or misplace the affidavit. So this Court has already found in its memorandum of June 2nd, that there was no misconduct with respect to Alvarez and I don't think I need to go into that any further. Essentially the Court placed no reliance on it and did not rest any part of its decision on Alvarez testimony. That inference clearly flows from the Court's discussion page 45 of the findings and elsewhere.

As I said earlier there is no culpable suppression that this Court finds on the record here, so essentially except for the situation on DeSouza, none of the grounds raised by either of the defendants sustain the motion for the new trial.

The newly discovered evidence is neither new nor material and the introduction of additional facts concerning the false testimony and information so-called, would not have altered the verdict and could have been availed of for the most part, at the time of trial. And the Prosecution did not knowingly suppress any evidence. And the evidence which was inadvertently lost would not have brought around a reasonable doubt to have avoided a conviction on those counts as to which a conviction ensued.

The foregoing constitutes the Court's findings of fact and conclusions of law. And I'll hear any oral request from either attorney to amplify those findings at this time. I'll engine would I you Mr. Moskowitz.

MR. MOSKOWITZ: The government has

ORDER DENYING MOTION TO RESETTLE

COPY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-against- :
86 Cr. 779

CHARLES DARLINGTON :

----------x

United States Courthouse

White Plains, New York

October 12, 1988

2:05 o'clock p.m.

B e f o r e:

HON. CHARLES L. BRIEANT,

District Court Chief Judge

A P P E A R A N C E S:

RUDOLPH W. GIULIANI
United States Attorney for the

Southern District of New York

BY: AVRAHAM MOSKOWITZ, AUSA

MOROSCO AND CUNARD

Attorneys for Defendant
99 Court Street
White Plains, New York 10601

BY: JANET E. CUNARD, Esq., of Counsel

P R O C E E D I N G S

THE CLERK: United States of America versus Charles Darlington.

THE COURT: Good afternoon.

You may be heard.

MS. CUNARD: Good afternoon, your Honor.

Your Honor, the defendant's motion seeks an order of this Court stating that certain issues were not considered and determined by this Court.

THE COURT: You understand, I hope, that the mandate of the Court of Appeals has never issued. There is nothing pending in the district court insofar as Mr. Darlington is concerned.

MS. CUNARD: Yes, your Honor, but it is my impression of the rules that the Court can at any time correct an ommision or like.

THE COURT: I think you misunderstand the rule, but I really don't see there is any error here to correct. You have a right to be heard. The most that the Court could do would be to advise the Court of Appeals that they should remand the matter for some proceedings before me, but I don't really have any basis to give the Court of Appeals that advice. I think you had adversary proceedings in this Court. The matter was heard to the best of my ability and an appeal was taken. As I understand a panel had affirmed the conviction and the mandate remains lodged at the Court of Appeals.

Our basic rule is, you can't have jurisdiction in a matter at both places at once.

MS. CUNARD: Yes, your Honor.

THE COURT: It is true that if I were

to signify a desire to change any of the prior findings, probably the Court of Appeals would acquiesce and remand the case. That's the most I can do today; and I am really not persuaded, but you have a right to be heard; but there is nothing pending on the district court as far as Mr. Darlington is concerned.

MS. CUNARD: Your Honor, if there is nothing that this court can do, I don't know what I can say. I would like to set forth what our position is.

THE COURT: I would be delighted to have you do that. I have examined your papers and I have examined the Government's letter, which will be docketed. And, of course, I am prepared to hear you, but I think you have to start off with that problem in mind.

MS. CUNARD: Yes, your Honor.

The defendant requested certain materials under the Jenks Act discovery in the trial court. The Government produced certain documents, others were requested. Your Honor directed that everything be turned over. There was no specific ruling as to whether what was requested was the Jenks Act or the Court was directing that it be turned over in the exercise of the Court's discretion.

THE COURT: As Brady material.

MS. CUNARD: As Brady material or as an extension of the permissible discretion under the Jenks Act.

The Government turned over a number of items. The Government did not turn over the original interview statements taken by the agents from the witnesses and we are concerned with three witnesses in particular. Those original statements

own rules require them to retain these papers. They are not permitted under their own rules to throw them away. The case law requires them to keep them; and if they cannot produce them, the Act itself requires striking of the testimony of the witnesses in question. They were the only witnesses against Mr. Darlington. It would require dismissal of the indictment.

THE COURT: Well, all right, Mr. Moskowitz, why don't you respond to this.

MR. MOSKOWITZ: Your Honor, during the trial, the trial counsel Mr. McCreery made a motion for the production of all rough notes taken contemporaneous --

THE COURT: She is not talking about rough notes taken by the agent, she is talking about statements of witnesses.

MR. MOSKOWITZ: She is talking about

the interview notes taken during the debriefing of the Government's witnesses. All of those -- all of the statements or the interviews were -- the way the process worked, your Honor, was a witness was debriefed, scratch notes were taken, the agents returned to their office, wrote a memo of the interview, routinely discarded their notes. That is the representation that was made during trial.

To the extent that rough notes were not discarded, and that was accidental, to the extent they remained in the trial, during trial the Government went back to the office, searched through the files and turned those over.

THE COURT: The contention is now made, I assume, relying on United States v. Buffalino that the notes have to be set aside because they were destroyed

were never turned over. The Government has repeatedly alleged that it has fully complied with the Jenks Act and the courts have said, yes, all right.

THE COURT: Give me, for the record, again, the three.

MS. CUNARD: Your Honor, it's Andrew Parris, Albert Scott or also known as Albert Thomas and Lisa Beechum.

THE COURT: Go ahead.

MS. CUNARD: We were never given the original statements taken from those witnesses. We were given later reports, but not the initial statements.

In one instance, not any of those cases, we were given an initial statement. We believe it is clear that it is a statement under Secton E(2).

There are major differences between that statement and the agents formal re-

port. We believe that these other initial statements would contain the same major differences. The Government has responded that those statements taken from the witnesses were routinely discarded after formal reports were prepared. The formal reports do not contain exactly the same thing as the original statements, as an examination and comparison of the one we received will show.

THE COURT: Well, of course they never do. But I can't currently require the production of something which according to your presentation doesn't exist. I can seek a response from Mr. Moskowitz, but the Court can't require the performance of an impossible act; and if these papers don't exist, they can't be used.

MS. CUNARD: Your Honor, the agents

prior to trial. That's what I understand the contention to be.

MR. MOSKOWITZ: Your Honor, that contention has been rejected specifically and explicitly by the Second Circuit on appeal of this matter. I have for the Court's convenience a copy of the slip opinion of the Court of Appeals, which has since been published and they expressly rejected that contention. There is language in there that specifically says that the agents are not required to keep their rough notes once those notes have been turned into a formal memoranda.

THE COURT: You might give me the page citation.

MR. MOSKOWITZ: It's at the end.

THE COURT: We had a panel opinion in Buffalino, which everybody remembers, which a panel in the Second Circuit did

claim that, and I really feel that the trial court ordered all that it could order. And I think the point is taken up here on page 7, and the facts don't seem to be in dispute with the Second Circuit. The Second Circuit seems to perceive the facts and they seem also to hold that if they don't cite Buffalino but they seem to hold that they can do what they did.

Now, I don't think, Ms. Cunard, with all due respect you have an argument with me on this issue. You presented this issue on a clear record to the Second Circuit and this panel said, quote, also the agents failed to produce their handwritten notes of interviews and they need not.

It's there on page 7. And your very fine motion papers here don't really make it appear to me that you are addressing

these particular sentences in the opinion.

On initial examination of this motion, it was quite clear to me that there was no jurisdiction to do anything with it except to tell the Circuit Court that I would like to do something with it if you let me, which they undoubtedly would as a matter of comity, but I have no basis to make that request. Of course, the facts are not in dispute.

The Second Circuit opinion says also the agents failed to produce; and the issue of law they have decided, so I don't know how you can respond to Mr. Moskowitz's comment.

MS. CUNARD: Your Honor, the Court said we see no reason to disagree with Judge Brieant's finding of no violation of the Brady rule of Section 3500. The Court of Appeals believes that this

Court specifically ruled on this statement. Now, I would ask while I am presenting my case if I might hand up a copy of what we are talking about, an E(2) statement. These are not rough notes. This is a complete statement that we are talking about. And the court never ruled whether we were talking about complete statements or rough notes.

THE COURT: You can hand it up, certainly. Mark it for identification.

THE CLERK: Government Exhibit 1 marked for identification.

MS. CUNARD: Rough notes under Section E(1).

THE COURT: I think the Circuit Court understands the issue here. I think that this Court ordered it produced. It turned out it couldn't be produced and they understand that it couldn't be pro-

duced. I don't know what else there is to do with this.

MS. CUNARD: Your Honor, if it can't be produced it has been wrongfully destroyed in violation of both the agents own rules and case law and sanctions must be imposed.

THE COURT: That's what you say, but the difficulty with that is it's that's not what page 7 of the slip opinion says.

MS. CUNARD: Your Honor, but the Court of Appeals --

THE COURT: This is a regular typical debriefing interview of any witness.

MS. CUNARD: Your Honor, we believe that that is the substantially verbatim recital of an oral statement as referred to in the Jenks Act, something which must be produced; and the courts upheld that the agents cannot destroy these

materials just to prevent discovery.

THE COURT: No one says they destroyed it just to prevent discovery, they destroyed it because that was their habit and practice.

MS. CUNARD: It's in violation of their rules.

THE COURT: You say so, but that's not what the Mandel opinion upheld.

MR. MOSKOWITZ: May I respond?

THE COURT: Very briefly.

MR. MOSKOWITZ: To the extent that there is any statement, anything that is in any coherent fashion with sentences that reflect what any of the witnesses told any agent of the Government, those were not turned over. The handwritten --

THE COURT: That's not what the Court of Appeals says.

MR. MOSKOWITZ: I said to the extent

that they existed. That handwritten statement, so to speak, that Ms. Cunard was referring to, was similar to all the other statements that were not turned over. The only difference was that one was handwritten by Agent Zarubin rather than being typed. It was Agent Zarubin's practice to handwrite the memos that he did; and Agent Goodspeed's handwriting was less coherent and legible and he continued to type his.

That's the only difference. All statements of that sort were, in fact, turned over. Those that Ms. Cunard has handed up to the Court were not rough notes, they were, in fact, a memo of the interview.

THE COURT: The indication is that the other agents, and most agents generally do exactly what occurred in Exhibit

1, they create a paper like this, they then dictate or write out at their leisure, type out at their leisure an intelligible report, and then they destroy the underlying handwriting; and it's clear to me that the Court of Appeals in this very case, on page 7, has said that's okay. So, I think that there is nothing for this Court to consider. To the extent that it's a legal issue, it's been resolved. To the extent it's a factual issue, there is no factual dispute.

MS. CUNARD: Your Honor, we would ask for a ruling on the four issues that we have presented in our motion papers as to whether this Court did consider and decide the specific issues presented, because we believe that those are issues which must be considered under case law.

THE COURT: I decline to make such a

ruling, first, for want of jurisdiction.

Secondly, I believe that even if this Court had jurisdiction to act on this motion at this time, which jurisdiction could be obtained by asking for it, there is no purpose in doing that because the record is clear as to what happened here. The Court of Appeals clearly understands what happened here and the Court of Appeals reached a decision about it; and while you may differ with it, that's the law of the case and there is no need for any further proceedings on my part. The motion is denied for absence of jurisdiction to act while the mandate lies in the Court of Appeals; but on the return of the mandate I would hold the same way.

I appreciate your efforts. I decline to do anything further in the

matter.

Thank you very much.

MS. CUNARD: Thank you, Your Honor.

(Whereupon, at 2:20 o'clock p.m. the Proceedings were concluded.)

C E R T I F I C A T E

STATE OF NEW YORK)

) ss:

COUNTY OF NEW YORK)

I, DINA M. COOK a Shorthand (Stenotype) Reporter and Notary Public of the State of New York, do hereby certify that the foregoing transcript of the Proceedings taken at the time and place aforesaid is a true and correct transcription of my shorthand notes.

I further certify that I am neither counsel for nor related to any party to this action, nor in any wise interested in the result or outcome thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of October,1988.

DINA M. COOK

United States v. Elusma, 849 F2d 76

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1060, 920—August Term, 1987

(Argued/submitted May 2, 1988

Decided June 10, 1988)

Docket Nos. 87-1519, -1525

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO ELUSMA and
CHARLES F. DARLINGTON III,

Appellants.

Before:

OAKES, KEARSE, and CARDAMONE,

Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, Charles L. Brieant, *Chief Judge*. Held, (1) defendant can be convicted for aiding and abetting principal where principal who is shown to have committed a crimi-

nal offense is not indicted; (2) defendant with requisite criminal intent can be convicted of causing an intermediary to commit proscribed conduct where intermediary does not have criminal intent.

Judgment affirmed.

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HARRY R. POLLAK, New York, NY, *for Appellant Elusma.*

JANET E. CUNARD, Morosco & Cunard, White Plains, NY, *for Appellant Darlington.*

AVRAHAM C. MOSKOWITZ, Assistant United States Attorney (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Celia Goldwag Barenholtz, Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge*:

Angelo Elusma and Charles F. Darlington III appeal judgments entered in the United States District Court for the Southern District of New York, Charles L. Brieant, Chief Judge, convicting them of knowingly preparing and filing false and fraudulent forms with the Immigration and Naturalization Service ("INS") in violation of 18 U.S.C. §§ 1001 and 2 (1982). Elusma also appeals his conviction on one count of conspiracy, 18 U.S.C. § 371 (1982) to defraud the United States and to violate 18 U.S.C.

§§ 1001 and 1546 (1982 & Supp. IV 1986). Unpersuaded by any of appellants' numerous arguments, we affirm.

BACKGROUND

On September 11, 1986, a twenty-count indictment was returned against Charles F. Darlington III, Arlene Cureton, Denise Oliver, Patricia Parris, Angelo Elusma, and Jean Louissaint. Count One charged all defendants with conspiring to defraud the United States and with arranging sham marriages to enable Haitians to become permanent residents of the United States, in violation of 18 U.S.C. § 371 (1982). Counts Two through Twenty charged that in connection with seventeen sham marriages the defendants knowingly prepared and filed with the INS false and fraudulent Forms I-130 (Petition to Classify Status of an Alien Relative for the Issuance of an Immigrant Visa) and Forms G-28 (Notice of Entry of Appearance as Attorney or Representative), in violation of 18 U.S.C. §§ 1001 and 2 (1982).

A second indictment was filed on November 24, 1986, against Darlington, Clyde May, Michelle Griffin, and Bonita MacIntosh. Count One charged them with conspiracy in violation of 18 U.S.C. § 371 (1982), and Counts Two through Nine charged them with knowingly preparing and filing false and fraudulent Forms I-130 and G-28 in connection with eight sham marriages, in violation of 18 U.S.C. §§ 1001 and 2 (1982).

Four defendants, Griffin, Cureton, Oliver, and Parris, pled guilty before trial, and two others, Louissant and Day, were convicted on all counts against them after separate jury trials.

A jury trial of Darlington on both indictments and of Elusma on the first indictment commenced on February 19, 1987, before Chief Judge Charles L. Brieant of the United States District Court for the Southern District of New York. Evidence was introduced that marriage arrangers such as Elusma matched Haitians who were anxious to obtain permanent resident alien status in the United States with United States citizens willing to enter a sham marriage for a fee. The marriage arrangers introduced the prospective spouses and then took them to obtain blood tests and a marriage license, and then went with them to the marriage ceremony. Immediately thereafter, the arrangers brought the couple to Darlington's law office. Darlington briefly interviewed the couple, after which the United States citizen spouse would sign blank Forms I-130 and G-28. Darlington would later complete the forms with false information representing that the couple lived together at a specific address when the couple was not living there and never intended to live as husband and wife.

As to the counts on which the appellants were convicted, evidence showed that false forms were filed concerning the marriage of Andrew Parris and Janise Accius (Count 6); the marriage of Lisa Beechum and Inorable Alincar (Count 10); the marriage of Albert Eric Scott, a/k/a Albert Thomas, and Merita D'Haiti (Count 18); the marriage of Sonya Faulkner and Luis Duquesne Absolu (Count 19); and the marriage of Denise Oliver and Herbert Pierette (Count 20). 78

The trial concluded on March 16, 1987, after the jury declared itself unable to reach a verdict. Darlington and Elusma waived their right to a jury trial and requested that Judge Brieant render a verdict based on the record developed at the jury trial. In a Memorandum and Order filed

on June 2, 1987, Judge Brieant found Darlington guilty on four counts of knowingly preparing and filing false forms with the INS, Counts 6, 10, and 18 of the first indictment and Count 8 of the second, and acquitted him of the remaining false filing counts and of the conspiracy count. The judge's order acknowledged that Darlington had "showed himself to be a pillar of the community and fine family man." 86 Cr. 779, 1017 (June 2, 1987). Judge Brieant found Elusma guilty of conspiracy to defraud the United States, Count 1, and of knowingly preparing and filing false forms, Counts 19 and 20.

Darlington filed a motion for a new trial, claiming *Brady* and Jencks Act violations and newly discovered evidence. After extensive argument, Judge Brieant denied the balance of the motion, finding "no violation of the *Brady* rule or Section 3500" and that the evidence developed through post-trial interviews and handwriting analysis was not newly discovered. Judge Brieant did, however, vacate Darlington's conviction on Count 8 of the second indictment and entered a judgment of acquittal on that count. Acknowledging the good reputation in the community that Darlington once enjoyed, Judge Brieant sentenced him to concurrent terms of one year and one day imprisonment and Elusma to concurrent terms of eighteen months' imprisonment.

DISCUSSION

Elusma first contends that his convictions for aiding and abetting the preparing and filing of false documents with INS must be reversed because Darlington, who actually prepared and filed the documents, was acquitted on Counts 19 and 20. It is true that a defendant cannot be convicted of aiding and abetting pursuant to 18 U.S.C.

§ 2(a), absent proof that a principal committed a criminal offense. *United States v. Ruffin*, 613 F.2d 408, 412 (2d Cir. 1979). Just as an aider and abetter must share in the principal's essential criminal intent, "the principal must be shown to have had the 'essential criminal intent.' " *United States v. Tashjian*, 660 F.2d 829, 842 (1st Cir.) (quoting *United States v. Sanborn*, 563 F.2d 488, 491 (1st Cir. 1977)), *cert. denied*, 454 U.S. 1102 (1981); *see also United States v. Powell*, 806 F.2d 1421, 1424 (9th Cir. 1986). As Judge Brieant acquitted Darlington on Counts 19 and 20 because he found that "[t]he record . . . fails to show proof beyond a reasonable doubt of scienter," Elusma cannot be convicted of aiding and abetting Darlington on these counts.

Nevertheless, we affirm Elusma's convictions on Counts 19 and 20. The evidence showed that false immigration petitions were submitted to INS on behalf of Luis Absolu and Herbert Pierette by their purported citizen spouses, Denise Oliver and Sonya Faulkner, and that Oliver and Faulkner were knowing signatories of false petitions. Notwithstanding the fact that neither Oliver nor Faulkner was indicted, Elusma may be convicted of aiding and abetting the filing of false forms, *see Powell*, 806 F.2d at 1424, because all the elements of the offense of aiding and abetting are present: "the commission of the underlying offense by someone, a voluntary act or omission, and a specific intent that such act or omission promote the success of the underlying criminal offense," *United States v. Perry*, 643 F.2d 38, 46 (2d Cir.), *cert. denied*, 454 U.S. 835 (1981).

Elusma's other argument on appeal is that there was insufficient evidence to convict him of conspiracy. We disagree. The evidence showed that he recruited three United

States citizens to enter sham marriages with Haitians, that 79
he drove the three couples to obtain blood tests and to the marriage ceremony, and that he admitted to Cureton that he had arranged a number of other sham marriages.

Darlington's five arguments merit little discussion. He contends that the trial court erred by not considering character evidence and absence of motive on the substantive counts. Yet Judge Brieant recognized Darlington as "a pillar of the community and fine family man." Moreover, neither character nor lack of motive negates the elements of the crimes of which Darlington was convicted. *Cf. United States v. Bagaric*, 706 F.2d 42, 53-54 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

Second, Darlington contends that the uncorroborated testimony of accomplices such as Cureton and Parris was insufficient to support the verdict. An accomplice's testimony, however, need not be corroborated to establish guilt. *Caminetti v. United States*, 242 U.S. 470, 495 (1917); *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976). Judge Brieant credited testimony which established that Darlington knew that he was filing false documents.

Darlington next argues that the court improperly relied on the theory of conscious avoidance in finding him guilty of filing false documents relating to the marriage of Andrew Parris and Janise Accuis. We disagree. The circumstances suggest that the marriage of Accuis and Parris was a sham so that the trial court could properly conclude that Darlington "deliberately disregarded the probable falsity" of the documents he prepared for filing with the INS.

Darlington argues that the Government failed to produce *Brady* and Jencks materials. We see no reason to disagree with Judge Brieant's finding of "no violation of the

Brady rule or Section 3500." *Cf. United States v. Petrillo*, 821 F.2d 85, 88 (2d Cir. 1987) (trial court's rulings on withholding of allegedly exculpatory evidence given great deference). Although the agents failed to produce their handwritten notes of interviews with potential witnesses, precedent in this circuit holds that they need not preserve such notes if the agents incorporate them into formal reports, *United States v. Barlin*, 686 F.2d 81, 92 (2d Cir. 1982); *United States v. Sanchez*, 635 F.2d 47, 66 n.20 (2d Cir. 1980); *cf. United States v. Gotchis*, 803 F.2d 74, 78 (2d Cir. 1986) (distinguishing agents' notes from informants' notes), which they did here on the day the interviews took place. Even if there were nondisclosed *Brady* materials, Darlington did not show that there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *see also Petrillo*, 821 F.2d at 88-89.

Finally, Darlington contends that, given his good reputation in the community, a sentence of imprisonment is excessive. The court acknowledged Darlington's good reputation before sentencing him to imprisonment of one year and one day, a sentence well below the statutory maximum of fifteen years' imprisonment and fines of $30,000. We therefore decline to disturb the sentence. *See United States v. Tucker*, 404 U.S. 443, 446-47 (1972).

Judgment affirmed.

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